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QUEEN'S BENCH
AND
PRACTICE COURT
REPORTS.

BY
JAMES LUKIN ROBINSON, ESQ.,
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. VI.
CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 12 VICT., TO TRINITY TERM, 13 VICT. :
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS:

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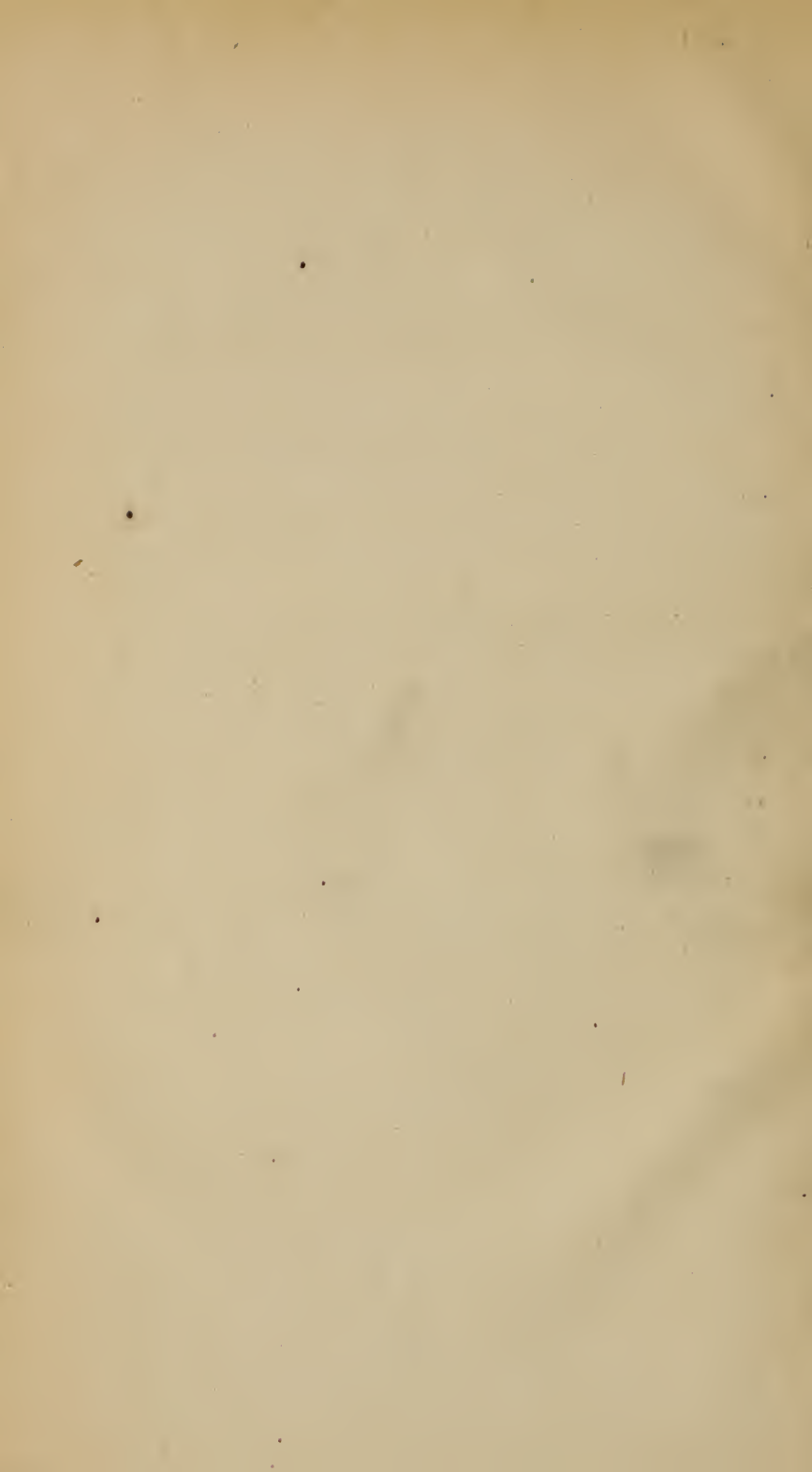
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JUDGES
OF
THE COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

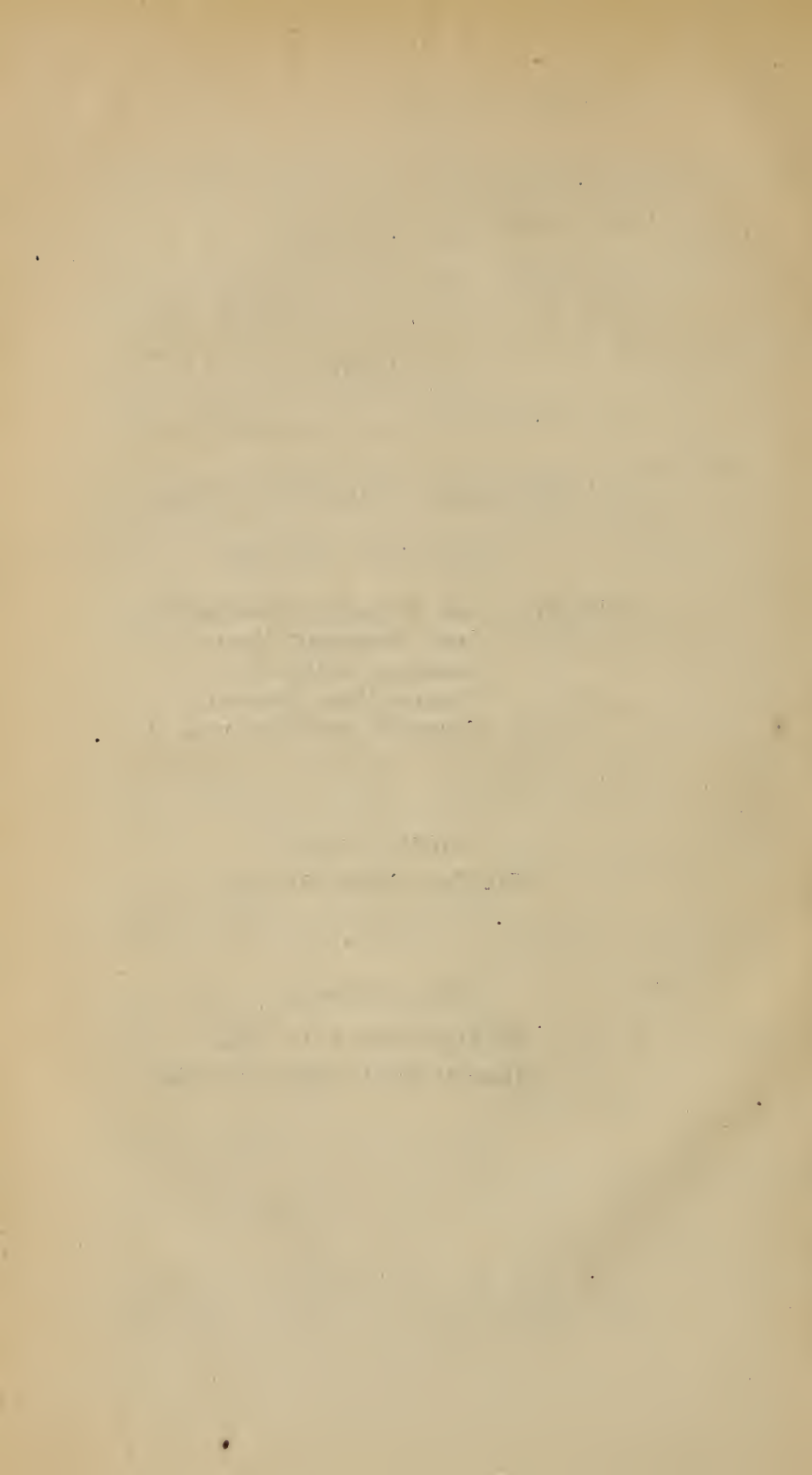
THE HON. JOHN BEVERLEY ROBINSON, C. J.
" JAMES BUCHANAN MACAULAY, J.
" ARCHIBALD McLEAN, J.
" WILLIAM HENRY DRAPER, J.
" ROBERT BALDWIN SULLIVAN, J.

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JOHN SANDFIELD MACDONALD, ESQ.



REPORTS OF CASES
IN THE
QUEEN'S BENCH AND PRACTICE COURTS.

JUDGMENTS DELIVERED IN HILARY TERM, MONDAY,
FEBRUARY 5TH, 1849—*continued.*

Present—THE HON. J. B. ROBINSON, C. J.
THE HON. MR. JUSTICE MACAULAY.
THE HON. MR. JUSTICE McLEAN.
THE HON. MR JUSTICE DRAPER.
THE HON. MR. JUSTICE SULLIVAN in the Practice Court.

DEMPSEY V. THE CITY OF TORONTO.

The plaintiff had been appointed many years ago by the corporation of the city of Toronto, weigh-master and clerk of the fish-market. He had been voted each year by the common council, a sum of money for his services during the then current year. The municipal year began on the 23rd of January. For the year 1847 the plaintiff had been voted 90% for his salary. On the 30th of June, 1848, the corporation having determined to farm out the plaintiff's offices, he was dismissed without notice, and without any allowance being made for services between January and June of 1848. The plaintiff brought an action of assumpsit against the corporation, to recover a year's salary, at the same rate as he had been voted the previous year. The corporation resisted the action upon the general grounds:—1st, that assumpsit for services rendered as upon an executed contract, not under the corporate seal, would not lie; 2ndly, that the plaintiff held his office at sufferance, both as respected tenure and allowance; 3rdly, that before action brought, the corporation should have been requested to vote an allowance. But, *Held, per Cur.*, that assumpsit would well lie—and that though the plaintiff holding, by the act of incorporation, his office during pleasure, could not recover the whole year's salary for 1848, still he was entitled to his salary for 1848 to the time of his dismissal, at the rate of salary voted to him for 1847—and that no previous demand upon the corporation to vote an allowance need be proved.

Assumpsit: 1st count. That in consideration that the plaintiff, on the 7th of February, 1848, would enter into the employment of the defendants, in the capacity of weigh-master and clerk of the fish-market, at a salary of 90% a year, for one year, the defendants promised to employ

and continue the plaintiff for one year from the 7th of February aforesaid; and that although the plaintiff, confiding in the defendants' promise, did enter into their employment, and continue until the 30th of June, 1848, yet that the defendants, during the same year—to wit, on the said 30th of June—wrongfully discharged the plaintiff, without any reasonable or probable cause whatsoever, by means whereof he hath been greatly injured, &c.

2nd count. For wages or salary, as clerk and hired servant of the defendants.

3rd count. On an account stated.

Plea, non-assumpsit and issue.

The plaintiff claimed 77*l.* 10*s.*, balance of the year's salary at 90*l.* a year, as weigh-master; and 104*l.* for two years' salary as clerk of the new market, at 52*l.* a year.

It appeared in evidence, that the municipal year of the defendants commences on the first Monday in February; that on Monday, the 23rd of February, 1835, by resolution of the common council of the city of Toronto, the plaintiff was appointed weigh-master and house-keeper; that on the 7th of December, 1835, it was resolved that the weigh-master be allowed 75*l.* per annum, as his salary for the current year, also the further sum of 12*l.* 10*s.*, as house-keeper of the city hall.

No appointment for 1836 appeared to have been made; but during that year the plaintiff resigned the situation of house-keeper, and on the 28th of September of that year, it was resolved that the weigh-master should be paid at the rate of 75*l.* per annum, for his services for the present year.

On Monday, the 20th of February, 1837, it was resolved that the plaintiff should be appointed weigh-master and clerk of the fish-market for the ensuing year.

No appointment appeared for 1838; but on Saturday, the 3rd of February, it was resolved that the weigh-master be allowed 75*l.* for his services as weigh-master and clerk of the fish-market for the *past* year; and on the 24th of January, 1839, it was resolved that he be allowed 75*l.* for his services for the past year, as weigh-master and clerk of the fish-market.

It was usual for the plaintiff, and other officers of the defendants, to apply yearly for re-appointment.

On the 11th of March, 1839, it was resolved that the plaintiff should be appointed weigh-master and clerk of the fish-market for the *current* year; and on the 30th of January, 1840, it was resolved that the weigh-master be allowed 80% for his services during the past year.

On the 16th of March, 1840, it was resolved that the plaintiff be appointed weigh-master and clerk of the fish-market for the current year. On the 12th of April, 1841, a similar resolution was adopted for the current year. On the 17th of January, 1842, the weigh-master was allowed 80% for his services for the current year. On the 18th of April, 1842, he was appointed weigh-master for the current year. On the 23rd of January, 1843, he was allowed 80% for his services for the current year. On the 22nd of January, 1844, the clerk of the weigh-house was allowed 85%, as *his salary* for the current year. On the 20th of January, 1845, a similar allowance was voted to the weigh-master, as his salary for the current year. On the 30th of June, 1845, the plaintiff was appointed weigh-master for the current year. On the 26th of January, 1846, he was allowed 85% as his salary for the current year. On the 2nd of March, the foregoing was rescinded, and resolved that the salary for the past year should be 90%; and on the 1st of April, 1847, it was resolved that the weigh-master should be allowed 90% for his services for the current year.

Although annual appointments were not regularly made, the plaintiff performed the duties of weigh-master and clerk of the fish-market, without interruption, until the 30th of June, 1848, when his employment ceased, by reason of the weigh-house and markets being farmed out from that time.

On the 29th of February, 1847, the plaintiff, by written application, prayed to be continued in his present situation until the 8th of March following.

On the 3rd of March, 1847, the standing committee on appointments, reported to the city council, that the subordinate officers of the corporation could only be appointed during pleasure by the provisions of the statute incorporat-

ing the city, and that it was therefore unnecessary to make annual appointments which were in effect invalid. The committee recommended such officers should be hereafter continued in their respective situations, without re-appointment, subject only to removal, as the law directs.

This report was adopted by the council ; and although the plaintiff continued to serve, no re-appointment took place by formal resolution in the year 1847, or afterwards.

No alteration was made in the salary, and the chamberlain paid the plaintiff 90*l.* for the year 1847, which the council confirmed.

It appeared that the salaries were usually paid by occasional advances made by the chamberlain during the year, on his own responsibility, not of course exceeding the amount that had been sanctioned for previous years ; and at the end of the year the allowances for the past year were voted by resolutions of the council.

On the 12th February, 1848, the plaintiff signed a receipt for 19*l.*, being balance of his salary as weigh-master, &c., for 1847.

On the 13th March, 1848, the plaintiff, by petition, dated the 28th February previous, requested to be continued in his present situation of weigh-master which was referred to the committee on appointments, who made no report thereon ; and on the 17th May, 1848, he gave a receipt for 12*l.* 10*s.* on account of his salary as weigh-master, &c.

The plaintiff gave evidence in support of his claim for an additional (independent) allowance, as clerk of the new market for the last two years, shewing that he had collected fees to the amount of 245*l.*, up to the 5th February, 1848 ; but the court rejected the demand, as manifestly covered by the allowance of 90*l.* a year for all his services.

It was also stated by the clerk of the council and the chamberlain, that the usual course of the council was to grant allowances to the officers of the corporation by yearly vote, after the services had been rendered ; and that it must be well understood by them that the amount of their remuneration depended entirely upon the liberality of the council to grant what was right. In short, that they were paid by occasional votes of the council.

The plaintiff was discharged or dispensed with without notice, and without cause, otherwise than that the defendants had farmed the situation, and considered he only held his offices during their pleasure, which was thus determined.

For the defendants it was objected :

1st. That the first count was general—for a yearly hiring, from February, 1848, to February, 1849, and that it was not supported in evidence, even treating the defendants as private individuals.

2ndly. That the defendants could only (if at all) be bound by a yearly hiring and salary, by contract under their seal, or by a formal act of the council, under the authority contained in the word “otherwise” in the statute of incorporation.

3rdly. That the act only authorised the plaintiff’s appointment during pleasure, and that no action lay against defendants, the plaintiff being in fact at sufferance as respects both tenure and allowance. The statute 4 Will. IV. ch. 23, secs. 22, 55 and 53; also 4 Bing. 309, *Bristowe v. Collyer*, and 8 Jurist, 213, were referred to.

4thly. At all events, that the defendants should, before action, have been requested to vote an allowance or remuneration to compensate his services, in their discretion.

The learned judge at the trial held that, irrespective of the statute, there was ample evidence of a yearly hiring, although there was no proof of an express hiring or appointment for a year certain, or from year to year. But that as against the defendants, it could not be inferred, because the statute appeared to authorise them to dismiss him at pleasure; and it would be inferring against the terms of the act, even if the defendants could otherwise expressly or impliedly bind themselves by parol for a year certain; wherefore the plaintiff could only be regarded as a yearly officer, *sub modo*, that is, in the event of the defendants not seeing fit, in the exercise of their pleasure, to dismiss him during the currency of the year.

That he did not think him entitled to recover a year’s salary as for a wrongful dismissal, but that his claim for remuneration during the period of actual service, i. e. from

the first Monday in February to the 30th June, 1848, should be left to the jury.

It was then mutually agreed that the jury should find a verdict for the plaintiff for 23*l.* 10*s.*, being the amount the plaintiff would be entitled to at the rate of 90*l.* a year, deducting the 12*l.* 10*s.* paid to him by the chamberlain on the 17th May last, with leave to the defendants to move to enter a verdict for them, if on the record and the evidence the plaintiff was not entitled to recover at all, and with leave to the plaintiff to move to increase the verdict to a sum sufficient to make up the salary for a year at 90*l.*, if the court should be of opinion that he was entitled thereto.

Cross rules were accordingly obtained and argued. *Burns* and *Dempsey* for the plaintiff, and *H. J. Boulton, Q. C.*, for the defendant.

The statute and authorities cited were—Harr. Dig. Cor. 1 Ch. Pl. 119 note; Angel & Amos Corp. 382, 383, 209; 5 A. & E., N. S., 546; 4 Mg. & Gr. 860; Comyn's Dig. Franchise F. 32; 8 Jur. 213; 4 Bing. 209; 8 A. & E., N.S.; 5 Will. IV. ch. 23, secs. 22, 53, 55, 57, 75; 12 Jur. 923; 6 A. & E. 829; 14 M. & W. 831.

ROBINSON, C. J., delivered the judgment of the court.

I think the light in which this case struck the learned judge at the trial was correct, and we all are of opinion, upon the consideration which we have given to the case, that the plaintiff is entitled to recover *pro rata* for the proportion of the year, 1848, which he served as weigh-master and clerk of the fish-market, according to the remuneration last fixed by the corporation; and that there is no clear ground on which we could hold him entitled to more; though his case seems a hard one, and he would seem to have been too summarily dealt with, considering that no fault was found with him, and no blame imputed to him.

The first point to be disposed of is, are the defendants liable to be sued in *assumpsit*; for if they are not, then there could be no recovery in this case, even upon the second count. The case of *Beverly v. the Lincoln Gas Light and Coke Company*, 6 A. & E. 829, is an express authority that a corporation may be sued in *assumpsit* upon an executed consideration, as for goods which have been

sold and delivered to them, and a demand for services actually rendered to them, at their request, must stand upon the same footing. The elaborate judgment of the court delivered in that case by Mr. Justice Patterson, shews that while the court disclaimed any intention to innovate upon the principles of the common law, they found it not easy to support by express authority the judgment they were pronouncing. The reasoning, however, is satisfactory, I think, to shew that what they were then deciding fairly resulted by reasonable inference from what had been already decided; and we have in this country gladly availed ourselves of whatever can be found in English decisions, having a tendency to remove a technical difficulty that would in general be found to militate against the claims of justice.

We have no occasion to consider whether the distinction which used to be recognized as existing between executed and executory contracts, so far as it bears on the necessity of using the corporate seal, is a solid distinction (which in the case of *Church v. The Imperial Gas Light Company*, 6 A. & E. 846, the Court of King's Bench seemed wholly to deny); because in the case before us the contract was clearly executed, in respect, I mean, to the plaintiff's claim for wages during the time that he actually served; and as regards that part of the demand, we can have no difficulty in holding that the defendants cannot stand upon it as a general principle, applying to all cases of corporations, that they are not liable to be sued in assumpsit for goods sold and delivered, or for services rendered to them, because they have never promised, under their seal, that they would give a recompense.

But then it is objected that, even as regards this part of the plaintiff's demand, he has no right to recover, admitting that a corporation may be sued in assumpsit upon such a demand, for that he can have no legal claim to any remuneration except what the common council may choose to vote him; that he can only claim under their vote or resolution in his favour, and that at all events the corporation can be liable to no action for his salary or wages, until he has first demanded of them to make him an allowance, and been refused after a reasonable request.

These objections are grounded on some provisions of the Toronto Corporation Act, 4 Will. IV. ch. 23. If there is any thing in the statute that can support them, it must be found in the 51st, 57th, 60th and 75th clauses, especially in the 57th and 75th, which enact that the common council shall allow to the inferior officers appointed by them "*such remuneration as to them shall seem meet,*" for those are the words of the 57th clause, the 75th clause being the same in effect, viz., that it shall be lawful for the common council to allow such salaries or perquisites of office, to the different officers appointed by them (except the mayor and chamberlain), as *they shall deem just and reasonable*. This, it is contended, places all such officers at the discretion of the common council, who, after they have received their services, may give them much, or little, or nothing, at their pleasure; but such is not the intent, or the effect, in my opinion, of these provisions. They are meant to give authority to the council to appropriate, and charge the public fund for such purposes, by their vote according to their discretion; in other words, to apply them as an individual can apply his own funds, in remunerating those whom he may have occasion to employ.

The council are by these clauses authorised to make all such necessary disbursements. It is true, that they may assign to any officer whom they propose to employ such remuneration as they may think reasonable, and no one can compel them to give more. The same discretion rests with every private individual in the management of his own affairs; and it is for the person who is asked to give his services to determine whether he will serve or not on the terms proposed to him. But it is not reasonable to suppose that the legislature could have intended, with respect to inferior officers of the description in question, whose services are not in any degree honorary, like those of the chief officer and the directors of a corporate body, that they are to give their time and labour throughout the year, and that after the corporation have availed themselves of their actual manual labour, they have a discretion to give them at the end of it 100*l.*, or five shillings or nothing.

There have been cases no doubt, where persons have

been found willing to serve on the express condition, that they are to take their chance of getting anything or nothing. That may be when the service is partly honorary, and the place desired for other reasons than money merely, or where it is well known that it must be uncertain whether the employer will have the means or not of giving any compensation. But this municipal body have power by law to raise by assessment the means of paying indispensable charges, and it could never have been intended that they might employ a clerk of the market, and a weigh-master, whose daily labour and attendance would be entitling the corporation to fees which they receive through his hands, and then that because they had appointed him no salary at the beginning of the year, they could resolve at the end that they would give him nothing. That the parties might possibly be on that footing with each other there can be no doubt, but it would be a strange and very unusual footing for a subordinate officer of this kind to be serving upon; and the question for us is, whether the statute, and what had taken place between these parties before the plaintiff's dismissal, can be fairly held to have placed him in that position. We do not think so.

The plaintiff appears to have been serving the corporation in the same capacity for about thirteen years, receiving never less than about 75*l.* a year, which the council gradually raised to 90*l.*; the plaintiff's labour, as it may be supposed, increasing with the population of the city, and with the consequent increase in the business of the market.

The common council usually voted him at some period within the year a remuneration by way of salary for the current year, which did not vary from the last, except by an occasional small increase. For 1847, he received in this way for his services 90*l.*, he went on serving in the year 1848, when on the 30th June the common council, not having made in that year any appropriation for his wages, suddenly dismissed him for no fault imputed to him, but because they then resolved to farm out the situation in which he was serving. Having express power by law to remunerate him out of the public funds for the services he had

rendered, they were bound I think to do so, and should have done so before they voluntarily dismissed him. Having put an end to his service and to the relation between them, has not the plaintiff a claim to enforce that just and reasonable compensation for his attendance and labour, which the defendants had authority to give him out of funds under their control, but which they have not given him? This cannot, I think, be denied. Because the 75th clause of the act makes it *lawful* for the common council to allow him whatever they may deem just and reasonable, he has not the less claim to demand of them to pay him what is in fact just. It is *lawful* for an individual who has employed another to give him as much for his service as he may think just, or as he may choose; but he has not therefore a legal right to say that he will give nothing, or what he chooses; neither do I think the corporation have a discretion, after they have received service, to allow it to pass without recompense, or with a mere nominal recompense.

Since the defendants passed no resolution during the year 1848, and while the service continued, for remunerating the defendant, but dismissed him without, the jury were warranted, I think, in taking the usual allowance that had been given, as the measure of recompense, supposing it to be the tacit understanding that the defendants were receiving the service on those terms.

The office of weigh-master is not mentioned in the statute, nor clerk of the fish market, otherwise than as it is included under the general term "clerks of the market," and I do not see that the plaintiff stands in any other situation than any person would have done whom the defendants might have employed to keep the market square clean and in order for a year, and might have dismissed after some months' labour, without giving him any remuneration for his labour. All that could be said in such a case would be, that as between themselves, the governing body and the city for whom they were acting, the defendants could give him what they pleased; that they might have resolved what they would give him before they set him to work, and then he might have accepted their allowance, or not, as he pleased. If he declined it, he would lose the employment;

if he accepted it, whether much or little, he could claim no more; but if they had merely set him to work, and said nothing about paying him, they would have no discretion after they had received his services, to resolve to pay him nothing, or whatever they chose. He could then have claimed a just remuneration for his labour, and would not be wholly at the mercy of his employer.

Though nothing is said about it in the act, the common council have, no doubt, authority to purchase various articles necessary for conducting their business; such as furniture for their hall and offices, stationery, &c. It is *lawful*, no doubt, for them to pay such sums as they think just and reasonable for the goods so purchased; but if they make no bargain before hand, the seller will compel them, as well as others, to pay what the goods are worth, and the defendants could not be allowed to be the judges in their own case, and enforce the acceptance of whatever they might choose to pay.

As to the necessity for the plaintiff making a formal demand on the defendants to vote him an allowance after they had dismissed him, I do not consider that we can hold that to have been indispensable.

The defendants knew he had served; knew they had dismissed him for no alleged misconduct, but to enable themselves to make another arrangement; and they must be taken also, I think, to have known that he had a legal right to be justly remunerated for his services rendered. This action is a sufficient assertion of his claim, unless we should be justified in holding that the plaintiff can recover nothing but what the corporation has previously resolved to pay him. They might, for all that can be shewn, choose to vote him a few shillings, or nothing; and unless that vote would be conclusive upon him, he cannot be bound to suspend his action, till they have made it, or been asked to make it.

We are of opinion, therefore, that for the sum which the jury has given as a just reward for the service up to the 30th June, 1848, the verdict may be properly entered. For any sum beyond we do not think the plaintiff's claim is sustainable. The act, in our opinion, gave to the defendants a right to put an end to the plaintiff's service at any time

they might think proper, and for any reason they might think proper; and neither upon the act itself, nor upon what had taken place under it, can the plaintiff claim a right that his service should continue till the end of the year. If he could not insist that he was engaged absolutely for a year, he could not claim a right to be paid to the end of it, nor for any longer time than he actually served.

The 22nd and 55th clauses are express that the common council may remove their inferior officers at their pleasure. The plaintiff must be supposed to have known that he was serving on those terms, and to have acquiesced in the condition. What passed in 1837, and the plaintiff's own petition presented in 1848, praying to be continued in the office, shew that the uncertain tenure of the office was clearly understood by the plaintiff. He desired to have an appointment for the year; the law did not sanction that; the common council did not accede to it; and we cannot on any ground hold that he was entitled to be regarded as being on that footing.

The case of *Beeston v. Collyer*, 4 Bing. 309, was cited in argument, and there is a good deal in the language of the judges that applies strongly in this plaintiff's favour, so far as regards the abrupt dismissal of him before the year was ended: but that was a case between individuals, and to be determined on general principles applicable to such contracts. Here the service was rendered under an act of parliament, containing provisions which bear upon the point of duration of the service, and which must have their effect, and there is reason and good policy to support them. This part of the case we think is clear.

The other question, whether the defendants are liable to be sued upot a quantum valuit, as an individual certainly would be, is a point which we have felt to be much more doubtful; but our opinion is, that they are liable, and that the verdict may be entered for the plaintiff, for 23*l.* 10*s.*

Per Cur.—Verdict to be entered for the plaintiff for 23*l.* 10*s.*

WHITE V. PETCH & MANNING.

A new trial was moved by the defendants on an affidavit sworn before a partner of the defendant's attorney.—*Held per Cur.*, on an exception taken when shewing cause, that the rule must on that ground be discharged.

The plaintiff sued in assumpsit for goods bargained and sold, goods sold and delivered, and on an account stated.

Pleas, non-assumpsit—2nd payment.

Verdict for plaintiff, £28 17s. 9d.

The defendants moved for a new trial, on the ground that the illness of Manning, one of the defendants, prevented him from going to Cobourg to attend the trial, and that his papers arrived there too late, so that the case was undefended; and they produced letters received from the plaintiff and from the plaintiff's attorney, from one of which it appeared that the plaintiff would have taken £5, and from the other £7 10s., in full of all demands.

The case was tried on the 5th day of the assizes, the court closed the next day.

The plaintiff objected that defendant's affidavit, on which he obtained his rule *nisi*, was irregular, being entitled Josiah Charles White, plaintiff, instead of Josiah White, as the cause was entitled; and that it was sworn before a partner of defendant's attorney.

ROBINSON, C. J., delivered the judgment of the court.

It seems very probable that the plaintiff has recovered £20 or so, more than is due to him, but no effort was made to put off the trial, nor any good reason shewn for defendants not having instructed counsel in time. They neglected their defence, but the letters of plaintiff and his attorney produced, make it pretty plain that the plaintiff did not claim so much.

It is not explained, on either side, whether the evidence on the trial of the quantity of lumber delivered was correct or not; and the defendants do not shew either that there was less lumber delivered, or how they had paid for it, so as to leave so small a sum as £5 or £7 10s. now due. Yet there seems such good ground for believing that the plaintiff has no just claim to anything like the amount of his verdict, that the court might, perhaps, have granted a new trial on pay-

ment of costs, though I confess I should for my own part have felt more clear in withholding the interference, on account of the neglect of the defendants to make their defence, and their omission to shew circumstantially by affidavit what the debt originally was, and how they have reduced it—*Gwilt v. Crawley*, 8 Bing. 144, is an authority hard to be resisted.

The objection taken to the affidavit, however, on the ground of its being sworn before a partner of defendant's attorney, is entitled as we think to prevail, and on that account the rule must be discharged.—4 T.R. 403 ; 1 Price, 116 ; 8 Taunt. 74 ; 7 Dowl., 127 ; 7 Bing., 224 ; 3 Moore, 325.

Per Cur.—Rule discharged.

GOODALL V. GLEN AND WART.

Held, per Cur., that in an action of trespass *quare clausum fregit*, to which the general issue is pleaded, (not per stat.) the judge who tried it may certify, under the 43rd Eliz., to deprive the plaintiff of costs, when the damages are under 40s.

In this case *Phillpotts* moves to rescind a certificate granted by Mr. Justice McLean under 43 Eliz., to deprive plaintiff of his costs, and that the master be directed to tax full costs, and to reverse the costs taxed to defendant Wart, on the ground that he was not shewn to be entitled to the proportion of costs of witnesses and of counsel's fees allowed to him.

Trespass *quare clausum fregit*. General issue. Verdict for plaintiff against Glen, 1s. ; and for defendant Wart.

Richards shewed cause. The following authorities were cited ; 4 Dowl., 621 ; *Hullock on Costs*, 19, 27 ; Str. 1232 ; 3 T. R. 37 ; 2 Arch. Prac., 1362 ; 4 Dowl., 621 ; 6 Dowl., 593 ; 11 A. & E. 193 ; 8 Dowl., 99 ; 2 C. M. & R. 663 ; 2 Y. & J. 547.

ROBINSON, C. J., delivered the judgment of the court.

So far as regards a revision of taxation, on account of charges for witnesses, nothing could be more trifling than this application—the amount being but a few shillings—and every opportunity having been afforded to the plaintiff to shew before the master what the facts were. We make no

order therefore to open the taxation on account of these costs.

As to the certificate under 43 Eliz., the case of *Smith v. Edwards*, 4 Dowl. 626, is expressly in point, to shew that the certificate was properly granted. The general issue in trespass is now to be taken in the same light as a special plea denying the act complained of, and nothing more. Under it the title could not come in question, for since the new rules, that must be taken to be admitted, unless in terms denied.

Then all that remains to be said is, that there are some cases, in which the courts in England seem to have held it to be the proper criterion for granting or withholding the certificate, when the damages are trifling, to consider whether the action could have been brought in an inferior court; and unless it could, then that the certificate should be refused.

No doubt the plaintiff could not have sued in trespass *quare clausum fregit*, in any of our inferior courts. But it has been held in other cases in England (8 Moore, 450), and and I think it is the more reasonable effect to give to the statute, that the legislature intended by the 43 Eliz. to check, not merely the bringing of those actions in the superior courts, which might as well have been brought in the inferior tribunals, but to restrain frivolous actions, which ought not to be brought at all, of which description of actions the learned judge who tried the present case thinks it to be one.

I do not, I confess, quite clearly understand the case of *Jones v. Thomas*, 8 Dowl. 99, if the Chief Justice, who determined it, is to be taken as having acted on the ground taken by the counsel in his argument. The reason for the judgment is not given in that report; but the record in that case contained a count for a battery; and such actions are expressly excepted out of the 43 Eliz., on which account it may have been properly held, that the plaintiff was entitled to the full costs; otherwise I do not see how the case is to be reconciled with *Smith v. Edwards*, or with what is the clear intention of the statute.—9 Price, 314; 2 Cr. M. & R. 663; *Hullock on Costs*, 19, 27.

Per Cur.—Rule discharged.

FORSTER V. HODGSON.

Rule made in term that on payment of a certain sum and costs, further proceedings should be stayed on the verdict given in the cause at the last assizes. This rule was served on the plaintiff's attorney, on the second Friday in term, with an appointment to tax costs.—*Held, per Cur.*, that the rule did not stay proceedings till the money was paid or tendered, and that the plaintiff was not irregular in entering his judgment on the next day, being the last day of term.

In this case a rule *nisi* was obtained by *Mr. Grant* to set aside the judgment and subsequent proceedings for irregularity, the same being entered up contrary to the rule of the court; and that the plaintiff's attorney, or the plaintiff, should refund to the defendant £1 2s. 1d., being the amount paid him above the amount of verdict and costs as taxed in the said rule. And also £6 10s. paid by defendant for sheriff's fees and poundage on the execution issued in the cause; with the cost of the application.

On the 20th Nov., 1848, the same application was made in chambers, and it appeared to the Judge that as there was no rule staying proceedings till the £121 17s. 11d. and costs should be paid, the plaintiff had a strict right to proceed in the meantime, but that the sheriff could not claim poundage not having levied the money.

In Michaelmas Term, the defendant's attorney obtained a rule *nisi* to set aside the verdict which had been given in the cause upon affidavits, shewing that by some inadvertence the plaintiff had recovered an amount over what was justly due. The plaintiff's attorney being served with this rule, came into court on the second Wednesday in term, and stated that the plaintiff did not dispute the reasonableness of the deduction contended for, and as he wished not to be delayed in his proceedings, he would at once consent to the verdict being reduced to the amount to which the defendant had thus moved to confine it.

The defendant's attorney expressed an anxiety that no more costs should be unnecessarily thrown upon his client as he only objected to the overcharge which was at last given up, and was ready at any time to pay the verdict as now settled, and costs.

After hearing these statements, it was ordered on Wednesday, 16th November, and so taken down by me in my

note of the case, that a rule should issue reducing the verdict to £131 17s. 11d., and that upon payment thereof, with costs taxed, proceedings should be stayed.

On Friday, 17th November, a rule in those terms was taken out and served on plaintiff's attorney, with an appointment to attend and tax costs at 12 o'clock of the next day, Saturday. Both attorney's did attend then, and the costs were taxed at £11 1s.

The plaintiff's attorney then pressed for payment of the verdict and costs, and was told by defendant's attorney that he could not undertake to pay him on that day (Saturday, the last day of the term), but was sure that either on that evening or on Monday, they would be paid, as his client had sold some property, and deeds were preparing, and he would receive the money at latest on Monday.

The plaintiff's attorney then said he would enter his judgment, which defendant's attorney remonstrated against, as the rule, he contended, gave him a reasonable time to tender the money.

The master thereupon withheld his signature, to the allocatur and taxed costs as on entry of judgment. The defendant's attorney then went to his client and got the money, £142 18s. 11d. The plaintiff's attorney sent his clerk to his office to demand £144, or about that. The defendant's attorney went then at once to the plaintiff's attorney and offered him the amount of the verdict, and costs, but the plaintiff's attorney claimed the costs also of entering judgment, which the defendant's attorney resisted.

This was within an hour and a half of taxation, and was about 2 o'clock, P. M., of Saturday. Execution was then put in sheriff's hands, who went and took possession of defendant's shop: the defendant's attorney thereupon went to the plaintiff's attorney, paid him the amount claimed, under protest, and obtained an order to the sheriff to stay proceedings.

The deputy sheriff refused to stay proceedings unless his fees were paid, including poundage, and he put an officer afterwards in possession, and seized (as he said) some cloth under the execution, and in security for his fees, amounting to £6 17s.

The only acts done by the officer, before receiving directions to stay proceedings, were attending at the shop and taking the key, though afterwards he placed a man in possession, and gave the defendant an inventory of the goods seized.

On Monday the defendant's attorney paid the deputy sheriff £6 10s., which he then demanded for his fees, and paid the plaintiff's attorney £144, which included the fees for entering judgment.

The plaintiff's attorney made affidavit, that the cause had been defended merely to gain time—that before any application was made he both wrote and spoke to the defendant's attorney, offering to deduct the excess in the verdict, which was objected to, so that it was quite needless to have moved for any rule: that when a rule was moved the plaintiff's attorney only desired to avoid being thrown over the term in case of the money not being paid, and therefore suggested to the court that there should be no stay of proceedings ordered, as he would accept the money at once if tendered: that he pressed for payment on Saturday, but could not get it, and was apprehensive that if he did not enter his judgment and take out *fi. fa.* on that day returnable last day of term, he would have to take out a writ returnable the following term, on which the money would probably not be collected till the return: that he therefore entered judgment at once, but did not take out his *fi. fa.* till half-past 2 o'clock: that the writ had been put into the sheriff's hands just before the defendant's attorney came, and offered the verdict and £11 1s. 0d. costs; and that he offered to take the verdict and costs without exacting any fees for the sheriff, though he did insist on the costs of the judgment.

Ewart shewed cause, and cited 6 M. & G., 705; 5 Dowl. 329; 3 Dowl. & Lown, 43; 11 A. & E., 826; 3 B. & P., 319.

ROBINSON, C. J., delivered the judgment of the court.

The sheriff's claim to poundage and other fees does not properly come up on this rule, at least, not the question, whether the sheriff ought to refund the money, but whether the plaintiff should be made to pay back those and other charges which it is complained the defendant has been

unnecessarily put to by unreasonable and irregular proceedings.

The whole trouble has been occasioned by a want of that liberal confidence which it might be expected one practitioner would be disposed to place in another, and which he ought to be perfectly safe in reposing.

The rule issued to the plaintiff's attorney precisely in the terms in which I took it down at the time in court, as being the order made on the Thursday, 15th November. If it had been suggested, or had occurred to the court that a certain time should be named within which the debt and costs should be paid, and that judgment should be stayed, in the mean time, the order would probably have been so made.

But we understood from the defendant's counsel, that his client was perfectly prepared to pay the money at once, the only contention having been about the portion of the claim which had been just abandoned. I supposed, also, that the plaintiff's attorney would, in deference to the rule, allow at least the time necessary for making the payment.

The reason given by him for being urgent and determined to have the money paid before the term ended, is not a captious one, for we cannot be certain that if he had been contented to wait till the Monday, which he had been asked to do, the defendant might not have failed then to make the payment, in order to avail himself of the delay till the next term, which he would not have been entitled to as a right, but still might have obtained without any thing illegal being done.

The difficulty seems to have arisen from the defendant's attorney not choosing to make himself personally and absolutely responsible; and since he would not do it, he had no claim to expect that the plaintiff's attorney would assume any risk or responsibility on his part.

We have merely, then, to consider whether the judgment was entered illegally. We think it was not; and that the application was rightly disposed of in chambers by Mr. Justice Draper, who declined to make such an order as we are asked to do.

In many cases, with regard to filing pleas and other acts,

after orders made granting indulgence or otherwise, a party is held to have some time to take his next step, from the necessity of the case, although the order may bind him to proceed *instanter*.

In some cases, twenty four hours have been understood to be the rule; in others, till the opening of the office on the next day.—3 B. & P. 319.

But though orders to stay proceedings, on payment of the debt and costs, are made in a great number of cases, and are often made, as the rule in this case was, without setting a day for doing the act, the defendant has cited no authority for holding that the other party is tied up in such cases for any definite time.

If the court here had been asked, on the 16th of November, to give the defendant time, till the Monday following, to pay the debt and costs, and to stay the entry of judgment in the mean time, I am persuaded we should not have done it; and this, I think, should lead us to determine that the plaintiff's attorney did not do wrong in entering up judgment on the last day of the term, since he could obtain no absolute engagement to pay the money even on the following Monday.

Per Cur.—Rule discharged.

SMITH V. SHAVER.

Held, per Cur., that the nisi prius record not having been altered after a new trial granted, but the entry being allowed to continue as before of the jury being respited to the term next following the preceding assizes, the defect could not be cured by amendment. The decision in this court on that point, of Doe Crooks v. Cumming, was adhered to.

In this case the plaintiff had obtained a verdict for 15*l.*, and the defendant moved to set it aside for irregularity, the case having been called to trial at a previous assize, and no alteration having been made in the record, so that it appeared as in the case of Crowder v. Rooke, 2 Wils. 144, that the cause was tried after the day of nisi prius mentioned therein.

ROBINSON, C. J., delivered the judgment of the court.

We consider the irregularity fatal, on account of the mistrial, and that the cases of Wood v. Peyton, 13 M. & W.

371, and previous cases decided in the Court of Exchequer in England, do not apply to the circumstances of this case, while the decision in our court of Doe dem. Crooks v. Cumming is expressly in point, and we adhere to it, and award a *venire de novo*, as was done in Crowder v. Rooke.

Per Cur.—An award of *venire de novo*.

DOE ARNOLD V. AULDJO.

Where the defendant obtained a new trial on payment of costs, and his attorney immediately afterwards wrote to the plaintiff's attorney, begging to know what his costs were, that he might pay them—and the plaintiff's attorney took no notice of the letter, but, after allowing some months to elapse, moved in term time to discharge the rule for new trial, on an affidavit that the costs were unpaid, and without any notice to the defendant's attorney to attend taxation, on the same day, entered judgment and took out an hab. fac., which was executed; *The Court*, on application of the defendant's attorney, set aside the judgment and writ without costs, and directed the defendant to be restored to possession.

The defendant moved to set aside the judgment signed in this cause, for bad faith on the part of the attorney for the lessor of the plaintiff, or for irregularity on account of no notice of taxation or of entering judgment having been given to the defendant, his attorney or agent; and because the rule for judgment was taken out after the costs had been tendered, which were to be paid as a condition of obtaining a new trial, and before the cause could have been tried a second time, no assizes having been held in that district where the venue in this cause is laid; and because no rule for judgment was filed with judgment roll; or to open the rule for a new trial either with costs or otherwise, and that the defendant be restored to the possession.

In Easter Term last, a new trial was granted on motion of the defendant, on payment of costs.

In Michaelmas Term (6th November, 1848), the plaintiff's attorney made affidavit that no costs had been paid, nor any appointment to tax costs served on him, and that there had been no arrangement between him and defendant's attorney for the taxation or payment of costs; that the venue had been changed by consent from the Talbot to the Niagara District, and that there had been an assize in the District of Niagara (viz. Spring Assizes of 1848), where the cause could have been tried if the costs had been paid.

On this affidavit a rule was granted in the Practice Court,

rescinding the rule for a new trial (6th November), and judgment was entered the same day, no notice of taxation having been first served, nor any copy of the rule rescinding the rule for new trial, nor any rule for judgment, nor a rule rescinding the rule for a new trial filed with the papers of the cause.

The suit had been conducted amicably up to the first trial, on both sides; and on, the 6th of July, 1848, immediately after new trial ordered, the defendant's attorney wrote to the plaintiff's attorney, requesting that he would send a bill of his costs for payment, but never received any answer; and the plaintiff's attorney, without any notice whatever, entered judgment and took out a *hab. fac.*, and the lessor of plaintiff has been put in possession:

The defendant's attorney forthwith applied for relief to a judge in chambers, who referred him to this court.

The plaintiff's attorney filed affidavits not denying that the defendant's attorney had written to him for the amount of costs, in order that they might be paid, but merely saying that, though the former proceedings had been by consent, he did not think he had *waived any right* he might have in consequence of the defendant's *irregularity* or *neglect*. He admitted that he had served no copy of the rule rescinding the rule for a new trial, and alleged that he did not consider it necessary to serve notice of taxation before he entered his judgment.

ROBINSON, C. J., delivered the judgment of the court.

Without determining that the omitting to give notice of taxation made the judgment irregular, we think it right in this case to take the same course that was taken in the case of *Ilderton v. Salt*, 2 Com. Pleas Rep. 250; and we make the rule absolute for setting aside the judgment and writ of *hab. fac.*, without costs, and that a writ of restitution issue to restore the defendant to possession; but no action to be brought for any thing done under the *hab. fac.*

It was most necessary and certainly improper to take no notice of the offer made by the defendant's attorney to pay the costs of last trial: and then to proceed suddenly and without notice of his intention to enter judgment, as if the plaintiff could not get his costs.

Per Cur.—Rule absolute without costs.

BANK OF UPPER CANADA V. ROBINSON.

Plea to an action upon a note "that the defendant's indorsement of the note declared upon, was obtained from him by the plaintiffs and others in collusion with them without consideration, by fraud, covin and misrepresentation;" *Held, per Cur.*, bad on special demurrer, for duplicity, as setting up two defences, viz.—fraud, and want of consideration.

Assumpsit on promissory note. Indorsees against indorser.

Plea, that the defendant's indorsement of the said promissory note in the said declaration mentioned, was obtained and procured from him the defendant, by the plaintiffs and others in collusion with them, without consideration, by fraud, covin and misrepresentation.

Demurrer—that plea is double, in setting up two several and distinct defences, viz.—that the plaintiff's obtained the note without consideration, and also by fraud, covin and misrepresentation.

Strong, for the demurrer. *Brough*, contra.

The following authorities were referred to:—3 U. C. R. 291; 4 Bing. N. C. 655; 13 M. & W. 651; 2 P. & D., 579; Bac. Ab. Pleas, A. 2; 5 Co. 98 (a); Dyer, 42 (b); 1 Cr. M. & R. 798; 2 M. & G. 348; 3 A. & E. 323; 6 M. & W. 274.

ROBINSON, C. J., delivered the judgment of the court.

I believe my brother Judges consider this plea bad for duplicity. It seems to me that it would not be unreasonable to look upon it as a plea setting up only the defence of want of consideration, as if the defendant had pleaded that the plaintiff fraudulently obtained the endorsement of the note without consideration.

There is some room for distinction, I think, between the present case and that of Smith and Oates, decided in this court, where the defence is that the note was obtained by fraud and covin, *and* without consideration. A plea in that form more clearly sets up a double defence.

There are some cases in which the plaintiff may have acted fraudulently, and yet where his fraud alone would not avoid the contract, but it is necessary to shew further that the other party has been imposed upon; as, for instance, a defendant cannot set up the mere fact that he was drunk when he contracted, as sufficient to avoid the

transaction; he must shew also that an advantage was taken of his drunkenness, which would be a defence like the present, shewing that the other party by fraud procured him to enter into a contract without good consideration.

It stands, however, on doubtful ground, and I should, at any rate, think it better to amend the plea.

Per Cur.—Judgment for plaintiff on demurrer.

WRIGHT ET AL. V. TUCKER ET AL.

Bail rendered their principal, and gave due notice of render within eight days after the return of process in the action against themselves on the recognizance—the plaintiffs nevertheless proceeded to judgment—the court stayed the proceedings unconditionally, that is, without exacting payment of costs up to the time of giving notice.

Mr. Eccles had obtained (last Michaelmas Term) a rule nisi to set aside all proceedings had in this cause, subsequent to the return of the process for irregularity with costs, on the ground that the defendant's principal had been duly rendered in their discharge to the sheriff of the District of Newcastle; and notice of render served on the plaintiff's attorney in due time and before proceeding against the bail, or to stay proceedings, and to have an exoneretur entered on the bail-piece, without costs, on the same grounds.

On the 25th Sep., 1848, an application was made to the same effect, in Chambers, and Macaulay, J., stayed proceedings to Michaelmas Term, that the court might determine the question which had been raised.

The process in this suit against the bail was returnable first day of Trinity, 1848 (31st July.)

On 1st August, 1848, the sheriff of Newcastle certified that Tinnery, the defendant in the original cause, was that day surrendered in discharge of his bail, and notice of render dated that day, was served on the plaintiff's attorney in the original action on the 3rd August.

On the 11th September, 1848, the declaration was filed against the bail, and plea demanded. The plaintiff entered common bail for the defendant, and entered final judgment for want of a plea, and execution issued the 25th September, 1848.

Mr. Scott, partner of the plaintiff's attorney, in this action

against the bail, swore that shortly after receiving notice of the render of Tinnery, he had a conversation with the deputy sheriff, and understood from such conversation, that no render had in fact been made, and that Tinnery had not been in custody; and that he believing this account, proceeded in the case against the bail to final judgment: that the declaration was served on one of the defendants, on 12th September, 1848, and on the other on 13th October: that no notice was given of the defendant's intention to move to set aside entry of common bail or service of declaration; but the plaintiffs were allowed to proceed to final judgment and execution. Mr. Eccles contended, that when render is after return of non est inventus to a ca. sa., though it cannot be pleaded, yet bail may have the full effect of it on motion.—1 Lord Rayd., 156; 1 Salk. 101; 5 A. & E. 81; McPherson v. Mosier, 2 Wm. IV. E. T.—and that they are entitled to have proceedings against themselves stayed unconditionally, when such render has been made within the time allowed by the rule of court, Trinity Term, 1 Anne.

Richards showed cause and cited 5 T. R. 363; 3 B. & P. 13; 15 E. R. 254; 8 T. R. 222; 8 Mod. 281.

ROBINSON, C. J. delivered the judgment of the court.

The plaintiff insists that he was at liberty to proceed till an exoneretur was actually entered on the bail piece, although he had notice of the render; and he relies on 8 Mod. 281, *Wild v. Harding*, in which it was so determined; and in *Williams v. Williams*, 1 Salk. 98, the law is so stated; and in the notes in "Cases in practice" to the rule of Trinity Term, 1 Anne, on this subject; it is treated as indispensable to the protection of bail, that the exoneretur should be actually entered. But the rule itself is otherwise, for it says expressly, that on render of the principal within eight days after the return of process against the bail, "and upon notice thereof given to the plaintiff or his attorney in the original suit, all further proceedings against the bond on the recognizance shall cease."

In *Bond v. Isaac*, Burr., 409, the court held in accordance with the rule, that the plaintiff cannot proceed after regular notice of the render, and in *Byrne v. Aguilar*, 3 E. R. 306,

the court say, "If a plaintiff proceed after due notice of the render, he does it at his peril."—3 B. & P. 13; 16 East. R. 167; 15 E. R. 254.

I do not think our statute 4 Wm. IV. ch. 5, varies the question here. The bail are not, properly speaking, discharged till an exoneretur is entered; but in my opinion, on the proper certificate of render being obtained, and due notice of render given, the bail are so far discharged, that the plaintiff proceeds afterwards at his peril, and the proceedings will be stayed unconditionally if he should so proceed.

In this case we think, that beyond all question, the proceedings of the bail should be stayed, and exoneretur entered on the bail piece, on payment of costs up to the service of notice of render; and that the only room for a question is, whether the bail are not entitled to be relieved unconditionally, that is without having to pay even the costs of their proceedings which took place before notice of render given, but within the eight days allowed for the render.

It seems to be settled by the cases of *Smith v. Lewis*, 16 E. R. 168, and 2 Chit. R. 100; and *Creswell v. Herns*, 1 M. & S. 742, that what we must hold to be the effect of plaintiffs being allowed to proceed at his peril is, that he gains nothing by his proceedings, and must pay the costs of them himself, for that after notice of render the court are bound to stay proceedings unconditionally, and that the plaintiff neither gets the costs of any proceedings taken after he had notice of the render, not even the costs of any proceedings before he had notice of render, provided such notice of render was given before eight days had expired after the return of process against the bail.

The rule is made absolute as moved in the latter alternative, i. e., to stay proceedings and enter an exoneretur on the bail piece, without costs.

Per Cur.—Rule absolute.

HARVIE V. CLARKSON.

“Good to— for the above goods, either to be returned or paid for.”
Held per Cur., that after delivery of the goods, they might be sued for as for goods sold and delivered.

Appeal from the District Court of the Home District.

Assumpsit for goods sold and delivered.

Plea, non-assumpsit.

The evidence to support the action was a memorandum given to the plaintiff by the defendant, which contained a list of the goods, and upon which the defendant had added at the bottom the words, “good to John Harvie for the above goods, either to be returned or paid for.” A demand of the goods was also proved.

Verdict for the plaintiff, with leave reserved to move for a non-suit on the ground, that on such a contract an action would not lie for goods sold and delivered.

The learned judge discharged the rule obtained, upon the leave reserved, and from this decision the plaintiff appealed.

Twart for the appeal. *D. Duggan* contra. The following authorities were cited: 1 M & W. 545; 8 Scott 839; 6 A. & E. 829.

ROBINSON, C. J., delivered the judgment of the court.

We think the judgment given in the District Court correct, and that this appeal must be discharged with costs.

The goods having been before in the possession of Clarkson, whether on commission or otherwise can make no difference; for all that appears, they were in his possession when he gave this memorandum, which fairly imports that he was to keep them as a purchaser, and pay for them like any other purchaser, unless he should return them in a reasonable time, or at least on request.

Per Cur.—Appeal dismissed with costs.

MOORE ET AL. V. HICKS.

When a defendant applies for a new trial on the ground that he was taken by surprise, by the cause being taken out of its turn, and was unprepared to enter into his defence, he must not rely on a general affidavit of merits, but must show that he had a defence, admissible under the pleadings, which he would have been able to sustain.

Assumpsit on an award and common counts.

Judgment by nil dicit.

Damages assessed at 76*l*, 19*s*. 8*d*.

The defendant moved to set aside interlocutory judgment and assessment of damages for irregularity, and on affidavits filed, on such terms as the court might think fit.

ROBINSON, C. J., delivered the judgment of the court.

There seems to have been no irregularity in signing judgment, or in trying the cause. If the defendant had sworn to some particular defence that he could have substantiated, we might have relieved him, and the question then would be on what terms as to costs; but he has not, as he should have done, laid before us some particular defence; he has sworn to nothing precise, but only generally as to merits. Then he should have moved before or during the assizes. The sum is on an award, which we must suppose to be right.

Per Cur.—Rule discharged.

DOE CLARK V. McINNIS.

A. dies in 1840; after his death B., his wife, remains in the exclusive possession of his land, until her second marriage, with the defendant, and since they both continue the actual possession, the wife claiming to have a life estate under A.'s will. C., the eldest son of the testator A. and B. his wife, *while out of possession*, assumes to convey the land, and all his interest in it, *as heir-at-law*, to the lessor of the plaintiff. *Held, per Cur.*, that C.'s deed to the lessor of the plaintiff was void, both at common law and by the Statute of Maintenance.

Held, also, that C., though claiming as *devisee*, and not as *heir-at-law*, would otherwise have conveyed by his deed *all* his interest to the lessor of the plaintiff, whether as *heir-at-law* or *devisee*.

Seemle, that the Statute of Maintenance applies in this province, as well to terms for years, as to estates in fee.

This was an action of ejectment, tried before Mr. Justice McLean, at the last Eastern District Assizes, wherein the plaintiff sought to recover possession of lot No. 11, in the 5th concession of the township of Charlottenburgh, in the said district.

The lessor of the plaintiff at the trial, stated that he claimed the premises by assignment from John Clark, who took them as *heir-at-law* of David Clark, deceased, who had held them as a portion of the Indian Reservation in the Eastern District, under a lease from the Indians.

It was proved at the trial, that John Clark was the eldest

son and heir-at-law of Daniel Clark, and that Daniel Clark had died in possession of the premises. Also, that John Clark by indenture, dated 20th September, in the year of our Lord, 1847, and which recited the title of Daniel Clark to the premises to have been under a lease from the Indians, and that the said John Clark was his heir-at-law, "assigned, transferred, and set over unto the said William Clark, the lessor of the plaintiff, his executors, administrators and assigns, the said lot No. 11, in the 5th concession of the Indian Reservation, in the said township of Charlottenburgh, *and* all the estate, right, title, interest, possession, term of years to come, claim and demand whatsoever, which he, the said John Clark, then had, or might, or ought, or should have, or claim in, or to, the messuage or premises, with the appurtenances aforesaid, by force or virtue of the said lease or otherwise, as the heir of the said Daniel Clark, as aforesaid, to have and to hold the said premises; and also, the said lease, and all the estate, right, title, interest and term of years, in and by these presents hereinbefore assigned, transferred and set over unto the said William Clark, his executors, administrators and assigns, to his and their own proper use and behoof, during the residue of the said term by the said Indian lease granted and yet to come and unexpired, in as large, ample and beneficial a manner, to all intents and purposes, as he, the said John Clark, then had or might, or should, or ought to have and enjoy the same, by force and virtue of the said Indian lease, or otherwise, as the heir of the said Daniel Clark aforesaid, subject to the payment of the rent, duties, services and covenants, in the said lease mentioned."

Also that Daniel Clark, deceased, had made a will, duly executed, to pass real estate, which contained the following bequests and devises, viz.,

"1st. I bequeath to my son, John Clark, the *farm*, consisting of 100 acres of land, be the same more or less, being composed of lot No. 10, in the 5th concession of the Indian Reservation, in the township and county aforesaid, together with *team* and *farming utensils*.

"2nd. I bequeath to my son, William Clark, the sum of 50*l.* lawful money of this province, to be paid to him,

William Clark, by my son John Clark, when he comes to the full age of 21 years. In failure of payment of the said sum of 50*l.*, then the said William Clark to have the north half of the aforesaid lot No. 10, in the 5th concession of the said Indian Reserve.

"3rd. I bequeath to my well beloved wife, Olive Clark, all chattels and household furniture; also to have full control and management of said property during her natural life. Then, I constitute and ordain John Hatch, of the township of Cornwall, in the county of Stormont, and Angus Parks, of the township of Charlottenburgh, in the county of Glengarry, both in the Eastern district and province of Upper Canada, to be my lawful executors to this my last will and testament."

It was also proved that the said Daniel Clark, deceased, died in possession of the said lot No. 11, and had never owned or been in possession of lot No. 10, the lot named in the will. That from the time of the death of the said Daniel Clark, up to the time of her intermarriage with the defendant, Olive, the widow of the said Daniel Clark, had remained in possession of the premises in question, claiming the right of ownership therein. And that from the time of her intermarriage with the defendant, she and the defendant had retained possession, claiming a similar right.

The following admissions were signed and put in at the trial, as part of the plaintiff's cause, viz. :

It is admitted in this case, by the parties and their counsel, for the purpose of trying this suit upon its merits, that Daniel Clark, late of Charlottenburgh, having been for many years previously in possession of lot No. 11 in the 5th concession of that township, under a lease dated on the 28th day of March, 1848, duly executed his last will and testament, according to law, by which he devised his farm, being the said lot No. 11 in the 5th concession of the township aforesaid, named in the will, by mistake, No. 10, in manner therein mentioned.

That for the purposes of this action, it shall be considered that the will has been duly proved before the Surrogate Court of the district, if proof of the will then were necessary.

That the deed of assignment from John Clark to William Clark, the present lessor of the plaintiff, was duly executed on the 20th day of September, in the year of our Lord 1847, which purported to make over to the said William Clark the residue of the term then to come in and to the said lot No. 11.

That at the time of the execution of the said deed of assignment, the defendants were in possession of the premises in question. And for many years previously, Olive McInnis, one of the defendant's, with her former husband, the said Daniel Clark, the testator, had been in possession of the said premises of which continued possession, both before and at the time of the execution of the said deed of assignment, the said William Clark and John Clark were aware.

That said testator, Daniel Clark, died on 9th July, A. D. 1840.

That the will of said Daniel Clark was duly registered in the registry office of the county of Glengarry, within the period of two months after the death of said testator.

That all objections with respect to any assent on the part of the executors of the said will to the bequest under it are waived for the purpose of this suit.

At the close of the plaintiff's case, a non-suit was moved for, on the grounds—

First. That the premises being held by lessor of plaintiff under a lease from the Indians, no title has passed from the Crown; and ejectment cannot therefore be maintained.—*Doe Ermatinger v. McCormick*, E. T. 5 Vic.

Secondly. That the assignment of John Clark, the heir-at-law, to lessor of plaintiff, only conveys any interest which he had as heir-at-law; and that as such he was not entitled to any interest in a leasehold property.

Thirdly. That by the evidence, it appears that at the time of the conveyance by John Clark to the lessor of the plaintiff, the defendant and his wife were in possession, claiming an interest and a right to hold the premises under the will of Daniel Clark.

The questions arising under the above objections were reserved by the learned judge for the opinion of the court,

and a verdict was by consent taken for the lessor of plaintiff, subject to the opinion of the court upon them, when, as the court should direct, a verdict was to be rendered for the defendants, or a nonsuit granted.

J. Lukin Robinson, for the plaintiff, *P. M. Vankoughnet*, for the defendant.

The authorities cited were—*Lovell* on Wills, 282; 1 M. G. & Scott, 717; *Doe Moak v. Empey*, E. T. 4 Wm. IV.; 11 E. R. 160; 7 Taunt. 79; 2 Atk. 102; 2 T. R. 659; 2 Russ & Mylne, 624; 4 T. R. 605; 2 Mylne & Keene, 149; Cro. Eliz. 9; 1 Atk. 419; 3 M. & S. 158; 16 Vez. 46, 314; 2 Bl. 929; 3 P. W. 111; 7 Taunt. 105; 7 Sim. 56.

ROBINSON, C. J., delivered the judgment of the court.

The most material question to be settled in respect of the title to this property is, whether Olive Clark, the widow of Daniel Clark, now Olive McInnis, wife of the defendant, took a life estate or any interest in the premises in question under the will of her late husband Clark. She claims an interest under the will, and her husband, the defendant, claims to be entitled in her right to the possession.

D. Clark died in 1840. His widow remained in possession constantly, until her marriage with the defendant, and since; and while they were both thus in actual possession, claiming to be entitled under the will, John Clark, son of the testator, on the 20th Sept. 1847, assumed to convey the land and all his interest in it, *as heir to his father*, to the lessor of the plaintiff.

I understand, from the case stated, that the defendant McInnis and his wife, were in full possession at that time of the property, to the exclusion of John Clark; and that being so, we cannot hold otherwise than that nothing passed by the deed to the lessor of the plaintiff.

It is unnecessary to cite the cases in our own court which have been decided upon the same principle—that a person dispossessed cannot make a valid conveyance, being disabled both by the common law and by the effect of the statute, 32 Hen. VIII. ch. 9.

That the objection applies as well in cases of conveyances of terms for years as of estate in fee, was long ago determined, *Partridge v. Strange & Croker*, 1 Plow. 77;

and the modern case of *Doe. dem. Williams v. Evans*, 1 M. G. & Scott, 718, shews that the courts in England then held themselves as much bound, as at any former period, to maintain the principle.

The law has not yet been placed on any different footing in this province, and therefore we continue to be bound by it; though I observe that a statute has been very lately passed in England, enabling parties to convey a right of entry. This decides the event of this cause, and a verdict must, in our opinion, be entered for the defendant.

There was clearly nothing in the objection, that the deed to the lessor of the plaintiff could at any rate pass nothing, because it only professed to convey all the right of John Clark as heir, when it was plain he took nothing in that capacity, but as devisee. The deed first conveys to the grantee the lot, and all the right of John Clark, as heir, so that if the grantor could convey the lot, he did so, whether he had any right as heir or not.

Upon the legal effect of the will, the parties probably would desire our opinion; but we think it more proper to withhold it, till it becomes necessary to determine that point, for the question, according to the judgment which we are now giving, affects the title of a third party, who is not bound by this record.

Per Cur.—Verdict to be entered for the defendant.

COMMISSIONERS OF PUBLIC WORKS V. DALY ET AL.

Commissioners of public works. Cornwall Canal. Arbitration. Setting aside award.

In dealing with awards made under the provincial acts 9 Vic.ch.37, sec. 24, and 10 & 11 Vic.ch.24, sec.3, the court will be governed by the ordinary rules of law as applicable to awards made between party and party. Under the two acts above mentioned, a submission by the governor in council to arbitration, is a submission in effect by the commissioners of public works.

The award made by the arbitrators appointed under the above acts, stated that they awarded that the commissioners of public works should pay to A. the sum of, &c., "for the damage done his property in the village Milles Roches, by the construction of the Cornwall canal." No further particulars of damage were stated in the award. Affidavits, however, were filed by the engineers of the public works, to shew that in their belief the sum awarded must have been given, from its amount, for consequential and not direct damage, such as the commissioners contended the arbitration could alone award upon. But, *Held, per Cur.*, that the affidavits nowhere stating in positive terms that the commissioners had allowed for consequential damages, and the award

being silent upon the subject, as it might be—the court could not assume the fact to be so—and upon that ground (if a valid one) set aside the award.

Quære? have the arbitrators the power under the acts above named, to award for consequential damage, as for loss of the carrying trade through the village of Milles Roches. No decision of the court was rendered necessary upon this point, but see the opinions of the court thereupon. The time given by the statute within which to move to set aside these awards, viz., one year, extends to Upper as well as Lower Canada.

A rule *nisi* had been obtained, on behalf of the commissioners, by Blake, Solicitor-General, calling on Daly to shew cause why the award made in this case should not be set aside—

1st. Because the award shewed no submission between the parties, but was an award made upon a reference by the Governor in council.

2ndly. Because the award did not shew that the said Daly had sustained damages by the construction of the Cornwall canal; or what the damage was which had been awarded upon.

3rdly. Because the award was founded upon, and allowance was made upon, matters of alleged damage, not within the statute.

4thly. Because the damages were excessive and unjust.

5thly. Because the award did not shew that the claim for damages arose from the construction, or was connected with the execution, of any public work theretofore undertaken, commenced or performed, at the expense of this province, or of Upper or Lower Canada.

A rule, in the same terms, had been obtained in other cases of awards made upon claims for damages occasioned by the construction of the Cornwall Canal, which will be presently enumerated.

The rule obtained in the case of the commissioners and Alexander McNairn, only varied from the others in assigning as another objection to the award, that “it is against evidence, as the claim had been before adjudicated upon and settled.”

The award in the case of John Daly was by William Freeland, Henry Fry, and John Ogilvy Hutt, Esquires, made on the 16th March, 1848. It recited that they had been duly appointed arbitrators and appraisers, for Upper Canada, by the Governor in council, under and by virtue of

an act, passed in the reign of her Majesty Queen Victoria, entitled, "An act to amend the law constituting the Board of Works;" setting out the authority given to them by the statute, which is—"to arbitrate, appraise, determine and award the sums of money, which should be paid, to any owner or owners, occupier or occupiers, or persons representing such owner or owners, for the *land or real estate which it might be necessary to take*, either in perpetuity or temporarily, for the use and purposes of the public works, or any of them therein set forth, or *as compensation for any loss or damage which might accrue* to them from the construction of such public works, or any of them, and with whom the commissioners of the said public works had not or could not agree, or whose claims had not been settled or adjusted under the former laws; and also on any unsettled claim or claims for property taken, or *alleged direct or consequential damage to property, arising from the construction or connected with the execution of any public works in any part of the said province*; or any unsettled claim or claims arising or to arise out of or connected with the execution or fulfilment, or on account of deductions made for the non-execution or non-fulfilment of any contract or contracts made for the performance of any such public works as aforesaid, or any part thereof, made and entered into with the commissioners of the said public works, or with any other board, or any commissioners lawfully authorised to enter into the same on behalf of the province."

The award then recited, that John Daly, of the village of Milles Roches, had preferred a claim "for damages done to his property by the construction of the Cornwall canal," and with whom the commissioners of the said public works had not agreed and could not agree.

And the arbitrators proceeded to state, "that his Excellency the Governor in council, had referred to them the claim of the said John Daly, for their decision; and that having taken upon themselves the charge of said award and arbitrament, and having been attended by the parties, &c.; and having inspected the premises for or on account of which such compensation for damages was claimed, they made their award as follows, viz.—

"That the commissioners of public works do pay to the said John Daly the sum of 75*l.* for the damages done to his property, in the village of Milles Roches, by the construction of the Cornwall canal."

This award was made under the hands and seals of the three arbitrators.

A *precisely similar* award was made in favour of Eliza Burphe, except that the sum awarded to her was £250 0 0

And so in favour of Jeremiah Vandusu, for . . 113 0 0

" " Nelson Stevens, for . . . 200 0 0

" " Charles Letrace, for . . . 150 0 0

" " L. Durosie, for . . . 100 0 0

" " James Irvin, for . . . 113 0 0

" " Jesse B. Hawley, for . . 200 0 0

" " Hector Manson, for . . . 250 0 0

" " James Bowen, for . . . 75 0 0

" " Merilla Hover, for . . . 95 0 0

" " Marcus B. Herriman, for . 200 0 0

" " William Emery, for . . . 150 0 0

" " Sewel Cutler, for . . . 250 0 0

" " William D. Brooks, for . . 110 0 0

" " William Daly, for . . . 130 0 0

" " Eliza Waggoner and Henri-
etta Colwell, for . . 130 0 0

" " Sarah Kewin, for . . . 150 0 0

" " George Robinson, for . . 300 0 0

" " Israel Brooks, for . . . 250 0 0

The award in McNairn's case, stated the money claimed to be for "damages to his dwelling-house and premises, in the township of Cornwall, by the construction of the Cornwall canal through the same," and awarded, "for damages which he had sustained by the construction of the Cornwall canal through his property, in the township of Cornwall, 250*l.*"

The other awards were all in precisely the same terms as that in favour of Daly, i. e. "for damages done to the property of the claimant in the village of Milles Roches, by the construction of the Cornwall canal.

The village of Milles Roches, is a small village on the bank of the St. Lawrence, some miles above Cornwall.

Before the canal was made, the main public highway through the province passed near the river, the village of Milles Roches being on each side of it, so that it was conveniently accessible to all the inhabitants of the village. The canal had been made to run on the north side of the village, crossing the old line of the road near the western end, and keeping on the north side or behind the village, leaving the village and the old line of road between it and the river, and thus cutting off the village from the new line of road which had been made outside or north of the canal, and thereby depriving the inhabitants of convenient access to the country around them. To get from the village to the present main road, it is necessary to pass through a culvert, which crosses the canal behind the village. All the claimants in the cases before the court live on the south side of the canal; some of them immediately on the bank of the river St. Lawrence.

With respect to the case, as it concerned all the claimants except Alexander McNairn, George Robinson and Israel Brooks, it was sworn on behalf of the commissioners, at whose instance the application was made, that before the construction of the *Rideau Canal* a very large traffic was carried on at Milles Roches, by reason of goods being obliged to be landed at Milles Roches (on account of the rapidity of the current of the St. Lawrence at that point, and for some miles above), and to be carried by land, on carts or waggons, for several miles, which gave employment to many persons living at Milles Roches; and by means of this, and of the water power along the river, a very considerable village was rising: that after the Rideau Canal was made, however, very little of this business of transportation upwards, past Milles Roches, was carried on; and what little there was ceased upon the completion of the Cornwall canal: that by the construction of the new road, the travelling which before that passed along the old road had been chiefly diverted to the new: that the claimants had not (as it was believed) sustained any damage by the construction of the Cornwall canal, unless the old road being stopped up, and the travel being diverted from the old road to the new,

and the claimants having to go by the culvert to the present main road, could be considered as damage.

It was shewn further, that in the opinion of the civil engineers of the government, who made the affidavits, the amounts awarded to the respective claimants were excessive and unjust.

The same facts and opinions were sworn to as regarded the cases of the claimants, Robinson and Brooks, except that it was admitted that in these cases land had been taken for the purposes of the canal; that they preferred their claim before the said arbitrators, not only for damages alleged to have been done to their property, but for land taken by the commissioners; and the arbitrators had received such claim, and had only awarded as for damage done to property, while they had, as the deponents believed, included in the estimate of such damages, the value of the land taken.

In the case of Alexander McNairn, it was sworn by the civil engineer employed by the government that five acres of McNairn's land was taken and used for the purposes of the canal, for which land compensation was made to him in or about 1839, by the commissioners, at an estimate of 15*l.* per acre; and that for such land, including houses, fences, and all things whatever, there was allowed to him 137*l.* 16*s.* 3*d.*, which, as deponent believed, was allowed to him for all damages he could claim or was entitled to in any respect, for land taken or damage done to him or his property by the construction of the Cornwall canal, and was in the opinion of the defendant an ample allowance. But the canal bank being near to McNairn's house, and apprehension being expressed of the insecurity of the house in consequence, the commissioners, in 1843, built a stone wall up the side of the canal, and filled up the intervening space to his house, at an expense of 75*l.*: that the house was worth no more than 175*l.*: that the deponent could not understand for what the arbitrators could have awarded 250*l.*, as he had been already fully recompensed for property taken and damage of every kind.

It was sworn further, by another of the engineers em-

ployed on the canal, that he was present in September, 1843, when McNairn preferred to Messrs. Vankoughnet and Shaver, then acting as commissioners of the St. Lawrence canal, a claim for damages; upon which the following remarks were made by their secretary. "The claim of Alexander McNairn, for land and buildings on lot 25 east half, amounting to 500*l.*, being examined, it was ordered, that he be paid the sum of 3*l.* 5*s.* 7*d.* for additional land taken by the canal and not paid for and in full of his claim:" that, nevertheless, one of the late commissioners who made that order, being produced on behalf of McNairn in the last arbitration, swore that he ought to be paid for his dwelling house, which they valued at 250*l.*, and it had not been taken into consideration when the 3*l.* 5*s.* 7*d.* was allowed to him: that the utmost value of the house was 175*l.*; and that it could be removed to a convenient place on McNairn's land, and replaced in good order, for 150*l.*: that 250*l.*, if awarded for the house, was excessive and unjust; but the deponents say they cannot tell for what it had been awarded.

On the other hand, affidavits were filed of McNairn, and on his behalf of Messrs. Vankoughnet and Shaver, and D. R. McDonnell: that the 3*l.* 5*s.* 7*d.* was only awarded as a compensation for a few perches of land taken in addition to the four acres: that the commissioners considered that they had no authority to entertain his claim for the house, and that the board of works must settle that. The two former swore that they did, at the request of the board of works, in 1843, soon after allowing the 3*l.* 5*s.* 7*d.*, apply to McNairn to know what he would be willing to take as compensation for the house, and that he demanded 300*l.*, which had never been paid to him.

Brough, *Vankoughnet*, and *J. Inkin Robinson* shewed cause. *A. Wilson* in reply. The arguments of counsel upon the construction of the provincial statutes 9 Vic. ch. 37, sec. 24; 10 & 11 Vic. ch. 24, sec. 3, and other clauses of these acts, and upon the general principles applicable to setting aside awards, fully appear in the several judgments of the court.

The following authorities were cited during the argu-

ment: 2 Mod. 169; 2 Cr. & M. 235; 2 T. R. 781; 1 E. R. 276; 8 E. R. 466; 2 Burr. 701; 3 Dowl. 317; 2 Dowl. 651; 2 Y. & J. 259; Watson on Awards, 219; 1 McL. & Y. 393; 1 Cr. & M. 533; 8 E. R. 15; 6 B. & C. 822; 6 A. & E. 123; 5 B. & Ad. 519.

ROBINSON, C. J.—The authority of this court to interfere in regard to this award is given by the provincial statute 9 Vic. ch. 37, sec. 21, and 10 & 11 Vic. ch. 24, sec. 3.

The former statute provides for three persons being appointed arbitrators in Upper and Lower Canada respectively, for the purposes of determining what amount shall be paid to claimants for property taken for public works, or damages done to property by their construction. The government is to appoint them. And it is enacted, "That the decision of the arbitrators shall be subject to the jurisdiction of the superior courts of law or equity within the jurisdiction whereof such arbitration shall have taken place, in like manner and to the same extent, and under the same regulations as apply to arbitrations by the submission of the respective parties."

This is the footing on which any control over such awards can be exercised in Upper Canada.

In regard to Lower Canada, a special provision is made in the same clause, which is to be accounted for from the different nature of the jurisdiction exercised by the courts there, they being judges of fact as well as of law in most cases. This provision, it is clear, is confirmed by the act to Lower Canada, and need not therefore be considered by us. But a sentence is added, which applies to both divisions of this province, and which provides "That no such award shall be set aside in any case, unless the application to the court shall be made within one year from the date of the award."

It is plain, from this short statement, that we are to be governed in general by our ordinary practice, in dealing with the awards made by the arbitrators in question.

The other statute 10 & 11 Vic. ch. 24, sec. 3, contains some provisions respecting awards for damages done by the construction of public works, but it provides "That any award made under the former act, or under the act, shall

be subject to all the provisions contained in the former act, (9 Vic. ch. 37) for the annulling or confirming awards directed to be made," &c.

According to the law of this court then in such cases we must confine ourselves to the objections stated in the rule nisi. At least, that is the general course, whatever discretion the court may have in extreme cases to act upon objections substantial and clearly fatal, though not brought to their notice by the parties.

It is the commissioners of public works in these cases, who on behalf of the government move against these awards. It may seem on a first impression, not very reasonable that they should do so, considering that the commissioners are all gentlemen appointed by the governor in council, and in whose selection the claimants, contrary to the usual course of arbitration, have no voice; but on the other hand we must presume that the government has selected impartial persons, having no greater bias in favor of the crown than of the claimant, and as they may err in judgment with the best intention, or may act illegally with or without bad motives, it will of course be the proper duty of the commissioners of public works in any such case to apply against the award; and the statute expressly provides for it.

The first exception taken is, that the award shews no submission between the parties, but appears on the face of it to have been made upon a reference by the governor in council. In that respect the matter seems to have taken the course contemplated by the statute 9 Vic. ch. 37, the 25th clause of which empowers the governor in council to refer to the arbitrators any unsettled claim of the nature of that in question for their decision.

It does not appear on the papers before us, when the claim was made, or the reference; but only that the award was made in March, 1848. I believe all may have taken place after the passing of the later of the two acts; that is, since July, 1847, in which case the reference to arbitration would as properly be made by the governor and council, as if it had been done before the act was passed. The commis-

sioners under the latter act might have tendered what they thought a fair compensation within a certain time from the claim being made, and perhaps they did ; though they were not bound to do so, in order to make any future reference regular, because that is a mere provision made for the protection of the government against unnecessary costs, if they choose to avail themselves of it. If the tender, being made, was rejected, or if no tender was made, the submission to arbitration would properly be by the governor and council.

I do not mean to say that the commissioners of public works might not perhaps take upon themselves to make the reference, under the general language of the 3rd and 4th clauses of the last act, though it is not expressly said that they shall or may do so ; but if they did, the reference would be treated as binding (if held to be so), on the ground that it was made by the department representing the government in matters of that kind, and I see no reason to doubt that the authority given by the former act to the governor and council to make the reference to arbitration in such cases, continued after the second act the same as before.

The 3rd clause of the second act directs that the commissioners when they tender any amount of damages shall give notice that if it be not accepted, "the claim shall be submitted to the decision of arbitrators appointed under the first act," and submitted, for all that is said to the contrary, as the first act directs, that is by the governor and council ; and at any rate, we cannot recognize the commissioners of public works as having any interest in this matter distinct from the government ; we must look upon it that it is the government through them, or through their own counsel, we cannot tell which, that are now moving against this award. It would be strange to suppose that the government can be insisting upon it as a ground for setting aside the award, that it was made upon their own submission.

I suppose the course taken was the natural one ; that the claimants made their claim to the commissioners, who reported the claim to the government, and the refusal of the compensation tendered, if any were tendered ; and that the governor and council then referred the claims to the arbi-

trators as contemplated by the first act, and equally, I think by the second.

The second exception is, that the award does not shew how the claimant sustained damage by the construction of the Cornwall Canal, or what that damage was.

In that respect all the awards except that in McNairn's claim are alike: the claim is recited in them as having been made "for damage done to his property in the village of Milles Roches, by the construction of the Cornwall Canal." The arbitrators state in their award that "they had inspected the premises for or on account of which such compensation for damages is claimed," and they award that the commissioners of public works shall pay to each respectively, the sum of, &c., "for the damage done to his property in the village of Milles Roches, by the construction of the Cornwall Canal."

The award, it will be seen, receives no additional explanation from the claims, for they are both in the very same words, and as all the awards, except in McNairn's case, follow the same form, they are either all good or all bad, so far as this exception is concerned.

The 2nd clause of 10 & 11 Vic., ch. 24, requires that each notice of claim shall state the particulars thereof, and how the same has arisen. What the notices of claim in these cases did in fact contain is not shown us, they may therefore, for all we now know, have shown particularly enough the nature of the injury or damage complained of. If they did, then the award would settle all the damage which had been so in fact referred, and at any rate it would settle all claims for damage, as I consider, of which the claimant was aware, and which therefore he might have included in his claim; though that is a point which might seem to deserve more consideration.

But we have no power to import in disposing of these awards, any new principle into the law of awards. It might be very convenient, and would be judicious with a view to the possibility of further claims, to describe in the award minutely the damage for which the compensation was awarded, but we cannot arbitrarily exact such a condition.

The legislature has not required it, and the common practice in case of awards does not.

On the contrary A. makes claims upon B., and they are referred; they may consist of a variety of complicated demands, but the arbitrator commonly ends his investigation by directing that B. shall pay a stated sum on such a day, and there is an end of it.

It would be rather for the protection of the party claiming than of the other, that particulars need be stated; for unless they are, the award would in its effect be looked upon as a compensation for every thing that could come within the submission. And when we consider besides, that the award is here made by arbitrators appointed by the government, we should incline the less readily to set the award aside at the instance of the government, for any supposed defect of form. The claimants to whom this money is awarded might reasonably complain, if at the instance of the government, we should set aside awards made by the arbitrators selected by the government, for such defects in form as would not be held to invalidate awards made between party and party.

The law does not require that awards shall specify the particular grounds on which the sum awarded is to be paid, and we have no authority to make these awards exceptions to the general rule.—1 P. & D. 391.

The third ground on which the rule has been moved is, that the money is awarded to be paid upon matters of alleged damage not within the statute. If this is to be taken with reference to what the award expresses, there is certainly no ground for the exception, for "damages done to his property in the village of Milles Roches by the construction of the Cornwall Canal," comes directly within the scope of the grounds of claim specified in the 25th clause of the 1st statute, and the 3rd clause of the second.

The very same words are used in both places, namely, "*claims for alleged direct, or consequential damages to property arising from the construction, or connected with the execution of any public work.*"

The award gives the money as compensation for "dam-

ages done to his property;" the statutes allow the claim for any damages done to property, whether direct or consequential, and any damage to the property that could be shewn to arise from the cause referred to, must come under one of these heads or the other. Then the award states the damage to have been done (i.e. occasioned) by the construction of the Cornwall canal, which unquestionably comes within the description of "damage to property arising from the construction, &c."

The award then shews no ground for holding that the arbitrators went beyond their authority in any allowance they made, and there is nothing placed before us in the affidavits or otherwise upon which we can pronounce that the fact was so. It is stated, indeed, in the affidavits, that the inhabitants of the village used to derive profit from transporting goods past the rapids by land, but that the construction of the Rideau canal had for the most part put an end to that business, and that what little they may have continued to do in that way was no longer required when the Cornwall canal was completed.

The inference which the deponents probably intended we should draw from the affidavits is, that the loss of that business to the people of the village, gave a check to its prosperity, and made property there, in consequence, less valuable, and that the claimants were allowed compensation for that by the award; which it has been contended in the agreement was a head of claim wholly inadmissible. But the affidavits do not any where contain the statement that the arbitrators did allow for such supposed damage; we are called upon to assume that they did, while at the same time the affidavits which have been filed in support of this application do contain statements of other damages which we think would well warrant an allowance in compensation. I mean the damage arising from a wide artificial canal having been constructed where there was nothing of the kind before, leading the water from the river above the village, and cutting off by it the main provincial road which used to run through the centre of the village, and by which the proprietors of land in the village could before freely pass and re-

pass to and from the surrounding country. These same proprietors can now only go from their property to the surrounding country by passing through a narrow dark culvert, and by a route circuitous in regard to most of them, reach the present main road from which the village along its whole extent is cut off by the canal.

Now if it were shewn, which it is not, that the 75*l.* awarded to John Daly, for instance, was given to him as a recompense for the first supposed injury, that is the general depreciation in the value of property in the village in consequence of the improvement in the navigation dispensing with the occasion for land carriage, thereby depriving the people of the village of a great source of employment in transporting the merchandize, and stopping the further circulation of large sums of money occasioned by it, we should have to pause before we could say that the arbitrators had acted illegally in giving compensation for such a damage.

Did the claimant sustain a substantial damage from the cause alleged? would be the first question; and of that the arbitrators are the proper judges. If they should find he did, could we say on clear ground that it would not be *consequential damage* "to property, arising from the construction or connected with the execution of the Cornwall canal?"

When the legislature have expressly said "direct" or "consequential" they put it out of our power to hold that the damage must be shewn to flow in some manner directly from the construction of the work.

It is hard indeed, for us to assign limits to the words "consequential" and "connected with the execution of;" they seem designed to include every possible damage to property that can be traced to the canal. They shew a willingness in the legislature to leave no one a sufferer in regard to his property in consequence of the construction of the work in question, but to provide for any claim he might have being liberally entertained and decided upon.

If they meant less, they should have used a more prudent reserve in the language employed, for they might be

sure that the widest construction would be contended for. If they intended that the very widest latitude should be allowed to the arbitrators, I do not see how they could well have used words that would have expressed that intention more strongly. And without determining what we might have held if the compensation had been shewn clearly to have been awarded on such grounds, I will remark, that it could never be safe to expect that this court can, by the application of an arbitrary restriction, confine the sense of words in a statute, which seem to have been purposely made as comprehensive as they well can be. It would appear unreasonable to imagine that the legislature really intended that compensation should be made from the public funds for the kind of damage alluded to, proceeding from a valuable public improvement ; for there is no end to the extent to which such claims might be carried, and on very plausible grounds. In point of fact such injuries, we know, are not in general compensated, though they must follow more or less from almost every great improvement. Any facilities afforded by new inventions or improvements, will generally have the effect of throwing some persons out of employment who used to find occupation in performing the same work in a less convenient manner. But it cannot be said that such grounds of claim are never considered, for in the statute which provided for the building of Blackfriars bridge in London—29 Geo. II. ch. 86, (see Hunter's History of England, 685) the corporation was empowered to treat with the Watermen's Company about a recompense in lieu of the Sunday's ferry from Blackfriars' stairs to the opposite shore ; and other cases might be found which it would be hard to distinguish from such a claim as I am now speaking of though, no doubt, the general principal and usage in such cases are against it. But left as we are, uninformed by any thing before us, that any part of the 75*l.* in this particular case or any part of the sum awarded in any of the other cases, was given upon such a ground, we must dismiss from our mind all that was said on that point.

Then as to any other ground of alleged damages spoken of, the affidavit speaks only negatively. They state that the

deponents are not aware of any other damage "which the claimants have received by the canal, unless the old road being stopped up, and the diversion of the travel to the new road, and then having to go by the culvert to the present main road, can be considered a damage." - They do not state that the compensation or any part of it was awarded on that ground ; and if they did, we are not of the opinion that it would be illegal, considering always the very comprehensive language in these particular statutes, which would seem almost to have been intended, and which for all we know may actually have been intended, to admit these very claims. It cannot be denied to be at least a "*consequential injury*" to property, arising from the canal, that it has been cut off from the main road, whereby the village in which the property stands has ceased to be a thoroughfare ; and that it has been placed in an insulated position, cut off from the adjacent country by a wide and deep artificial canal, which has to be crossed by a narrow culvert at one end of the village. Before that canal was made, people could freely pass from every lot in the village directly into the country by a broad public road, accessible to each lot. The deterioration in value of his property which must be occasioned by the change, is certainly not imaginary ; and if the arbitrators have allowed 75*l*, wholly or in part for the injury spoken of, we have no data before us on which we can say that the allowance is excessive ; nor would it follow, if we considered it excessive, that we could therefore properly set aside the award. That is a ground which can be acted on only to a limited extent. The award must be such as to shew clear misconduct and partiality—it must be outrageous—before we could interfere merely on the ground that we think the arbitrators gave too much. It is their judgment, not ours, that is to determine the value of the property and the extent of damages. If this were a case between party and party, we could not act on anything that is shewn against this award. The statute is clear on that point.

This disposes also of the 4th objection, that the damages are excessive and unjust ; we cannot say that they are, for we have no means of judging, if we were the proper judges.

The 5th objection is, that the award does not shew that the work which is said to have occasioned the damage was "a public work heretofore undertaken, commenced or performed, at the expense of this province or of Upper or Lower Canada."

This objection refers to the 25th clause of 9 Vic. ch. 37; but surely it was not necessary that the award should tell us, that the Cornwall canal, or in other words the St. Lawrence canal, is a public work, undertaken at the expense of Upper Canada, before that act was passed.

The fact of the Governor and council having referred the claim to these arbitrators, is an admission that the case was one that came under the statute.

As we do not find any clear ground which would justify us in interfering with these awards, it is unnecessary to consider whether the application was made too late, that is, after a whole term had intervened. Whatever effect the negative provision in the 9th Vic. ch. 27, sec. 29, might have on such a question—that is, that no award shall be set aside in any such case, unless moved against within a year,—it applies, I think, equally to awards made in Upper as in Lower Canada.

All the awards, except that in McNairn's case, seem to stand on the same ground, except that in regard to two of them, the affidavits state that the claim was partly for land taken. There could be no doubt that that would be a claim of the most direct kind, and so far those awards would be less open to objection than the others.

The affidavits seem intended to support a complaint, that though the arbitrators received evidence of property taken for the use of the canal, as well as of other damage done, and (as the deponents believe) included the value of land taken, in the estimate of damage, yet they have awarded only as "*for damage done to property.*" Nothing of the kind, however, is relied upon in the rule, and if there were anything in the exception, it would be contrary to the general practice to entertain it; but at any rate, no such exception is supported, for if the arbitrators received a claim for property taken, and have clearly allowed nothing for it

in their estimate, there is no injury to the party moving against the award.

I am of opinion that all the rules must be discharged. Whether the awards are, or are not, in fact just towards the public in all points, we are not able from the information before us to judge. They may be excessive in some instances, but no ground is shewn on which we could properly set them aside. They are awards made by the arbitrators appointed by the government—made under statutes which give them very comprehensive and indefinite powers, as regards the description of damage for which they may award compensation. They are not on the face of them illegal, and no ground is shewn on affidavits, or otherwise, on which we can hold them to be so.

MACAULAY, J.—Assuming that the court can, by virtue of the statute 9 Victoria, chap. 37, sec. 24, exercise jurisdiction over the award, without a necessity for the submission, or award (see statute 3 Will. IV. ch. 17, sec. 22) being made a rule of court—still, I certainly think, that when an application is made to set aside an award on the grounds taken in these cases, the application of the party to the commissioner of public works, under the statute 10 & 11 Vic. ch. 24, sec. 3.—of the sums (if any) tendered by the commissioner thereunder, and of the order of the Governor in council under the statute 9 Vic. ch. 37, sec. 25, referring the claims to the arbitrators appointed under the 24th sec. of that act—should be shewn; for without them the subject-matter of the reference does not appear.

The awards seem perfectly good on the face of them; and though pointed at, the affidavits do not shew that claims for damages, by loss of the carrying business at Milles Roches, were preferred, or entertained, or allowed.

According to a strict interpretation of the act, the time for applying to set aside an award would be limited to the same period as in cases under the statute 9 & 10 Will. III., ch. 15, under the statute 9 Vic. ch. 37, sec. 24, which subjects awards to the jurisdiction of the courts in like manner and to the same extent, and under the same regulations as apply to the arbitrations by submissions of the parties. It

is, however, susceptible of a more enlarged construction, so as to allow the application to be entertained at any time within a year (see 4 & 5 Vic. ch. 38, sec. 21), and in this construction I concur.

As to what may constitute consequent damages to property arising from the construction or connected with the execution of the canal (10 & 11 Vic. ch. 24, sec. 33), no facts are before us to which to apply the statute, for the affidavits of Messrs. Keefer and Macdonell do not assert that the arbitrators entertained any such claims, or have in their award allowed damages for any such loss or prejudice. It is unnecessary, therefore, to express any opinion upon the construction of the act in the abstract; I will therefore merely remark, that while the statute 4 Will. IV. ch. 40, sec. 5, empowered the commissioners of the St. Lawrence canal to alter any highway, and to cause to be made another public road, and to satisfy any persons for all claims which they might sustain in consequence of such alterations, in the same manner as other claims were to be satisfied under the 3 Will. IV., ch. 17—the cases of *Rex v. Commissioners of the Nene-outfall*, 9 B. & C. 875; 4 M. & R. 646; *Rex v. the London Dock Company*, 5 A. & E. 163; and *Rex v. the Hull Dock Company*, 11 Jurist, 15, and others there referred to, shew that the canal, putting an end to the transportation of goods by land carriage past the Milles Roches rapids, did not constitute any ground for damages, but that to entitle a party thereto, the damages must arise from the infringement of some vested right in analogy to cases in which actions at law are sustainable for consequential damages, in like cases between the owners of property, and a tortfeasor. The inhabitants of the Milles Roches village had no monopoly or legal or vested right to convey goods by land past the rapids, and the loss of such business, by reason of the canal, would not constitute a legitimate ground of damages under the statutes; but they had a vested right in relation to the high road, and its obstruction and diversion manifestly caused consequential damages to their property as affected thereby, and for which they are clearly entitled to compensation.

The foregoing observations apply to all the awards. As to that in favour of McNairn, it is sufficient in itself; and the affidavits filed in his behalf repel the allegation against it, that the arbitrators had allowed him for lands or damages already compensated for. As respects the awards in favour of George Robinson and Israel Brooks, it does not follow that because they claimed for land taken, that the language of the award (being for damages done to their property by the construction of the canal) is not comprehensive enough to include it, as it is alleged to have done in fact—nor is the matter really submitted shewn in a regular way, as already mentioned.

SULLIVAN, J.—The first question to be settled relates to the time at which these motions are made, the awards which are sought to be set aside having been made in the month of March, 1848, and the motion not made till Trinity Term, and not within the next term after making the award.

The cases do not come within the strict terms of the act 8 & 9 W. III., c. 15, as the submissions are not made rules of court.

The courts have, however, in numerous cases adopted the statutory limitation, as conveniently applicable to other cases, relaxing it only under very special circumstances.

Awards illegal on the face of them may be objected to, and refused to be enforced at any time, but they cannot be set aside.

When verdicts are taken, subject to awards, they must be moved against in the first four days of the ensuing term to the award, where the cause only, and nothing else, is referred.

The statute 9 Vic. ch. 37, sec. 24, directs that three arbitrators or appraisers shall be appointed for Lower Canada, and three for Upper Canada, who shall, within the portions of the province for which they are appointed, arbitrate on, appraise, determine and award the sums which shall be paid to any owner or owners for the land or real estate which it may be necessary to take, or as compensation for the loss or damage which may accrue to them from

the construction of public works, and with whom the commissioners cannot agree. Provided always, that the decision of the said arbitrators shall be subject to the jurisdiction of the supreme courts of law and equity within the jurisdiction whereof such arbitration shall have taken place, *in like manner, and to the same extent and under the same regulations, as apply to arbitrations by the submissions of the respective parties*; and any award made under this act in that part of this province formerly Lower Canada, shall be liable to be set aside at the instance either of the commissioners or of any party interested by the judgment of any court of competent jurisdiction in that part of the province, if the court shall be of opinion that *injustice has been done*, and that the value of land, real property or rights, in which the award was given, shall be finally determined by the judgment of the said court.* Provided always, that no such award shall be set aside in any case, unless the application to the court shall be made within one year from the date of the award.—See 4 & 5 Vic. ch. 38, sec. 21.

It is argued on the part of the parties who appear to sustain these awards, that the limitation as to time given by the statute only applies to Lower Canada, because in that part of the province no such limitation existed previously, and because the words “such award” refer to the last antecedent, and because in dealing with the awards in like manner and subject to the same rules and regulations as apply to arbitrations by the submissions of the *respective parties*, the courts in Upper Canada would fix a much shorter period within which a motion must be made to set aside an award.

It appears to me that the proviso cannot be limited so as to apply only to Lower Canada; it is sufficiently comprehensive to apply to all awards mentioned in the clause, which goes on further to enact a provision evidently applicable to both sections of the province. There is in fact no statutory limitation of time for moving to set aside these awards, or such awards as these, in Upper Canada more than in Lower Canada; although the courts have, in cases not falling within the 9 & 10 Will. III., adopted for conve-

nience the time given by that act. Then the proviso does not enact that any time shall be given, but I think it was intended to limit the discretion of the courts in both sections of the province, as to the longest time that was to be given, and to limit them both equally. It may be that the court, in either portions of the province, may at their discretion shorten the time for the application; but I do not think that they can *in any case* lengthen it, or that this can be done in Upper Canada any more than in Lower Canada.

I find in the case, *Potter v. Newman*, reported in 1 Tyr. & G. 29, a construction given to the statute 3 & 4 Will. IV. sec. 39, exactly in accordance with my construction of this act. The words *any such arbitrator*, adjudged in that case to refer to the words any arbitrator, in the beginning of the section; are as intimately connected with an intermediate enactment as in the present instance; and if they were referred to the last antecedent, as was contended for in that case, as in the present, the power of the court to enlarge the time for making an award would have been limited to cases where an attempt at revocation had been made. The court, however, decided on the reference of the words to the first part of the section, retracting an opinion expressed when the rule nisi was moved; and the construction then given to the clause was afterwards adhered to.—See *Burley v. Stevens et ux.* 1 M. & W. 156.

If my construction of the 24th section 9 Vic. ch. 37, be correct, the court would still have the discretion to apply or forbear to apply the rule of practice, adopted by analogy to the statute of Will. III., to cases between the crown and the subject, over which they are given special jurisdiction by this act. The maxim *nullum tempus occurrit Regi*, would seem to forbid a constructive limitation to the rights of the crown, arising from arguments of convenience; and apart from the notion of prerogative privileges, there are many reasons why the public interests should not be dependant upon the watchfulness of public servants, as the rights and interests of individuals are made to depend upon their own care of their own affairs. In theory, no neglect

or default of a public officer, should affect the rights of the crown, or of the public; and in practice, it may be easily conceived that matters belonging to the details of government cannot by any possibility always engage immediate attention, as the private concerns of individuals may and are supposed to do. The fact that awards had been made in the present instance, if reported to the government in time, and also the fact of the injustice or exorbitancy of the awards, might be excluded from the attention of the government by more urgent matters, so as to cause a term of this court to pass by without an appeal, however just or right an appeal from the award might be. And as the statute does give a limitation of time, by which the crown and the subject are equally bound, I cannot bring myself to the conclusion that the rule of practice adopted in cases of arbitrament in England, as between private parties, and followed in like cases in this court, should be held applicable to public proceedings, for ascertaining the respective rights of the crown and the subject.

If this court at this time have a right to entertain this motion, and think it just to do so, it is next to be considered what are the nature of the claims which the arbitrators have a right to allow. The 24th section, which I quoted above, gives them authority to arbitrate and determine, appraise and award the sum and sums of money which shall be paid to any owner or owners, occupier or occupiers, &c., *for the land or real estate which it may be necessary to take for the use and purposes of the said public works, or as compensation for any loss or damage which may accrue to them from the contractor of such public works, or any of them,* and the 26th section enacts that it should be lawful for the Governor in Council to refer to the said arbitrators, for their decision, any unsettled claim or claims for property taken, or for alleged *direct or consequent damages to property*, arising from the construction or connected with the executing of any public works, in any part of this province, heretofore undertaking, commenced or performed at the expense of this province, or of either of the late provinces of Upper or Lower Canada. There is no enactment

in this statute as to the nature of the damages to be allowed for, no direction to the Government or the arbitrator as to the claims which owners of property have a right to insist upon—and other statutes must be referred to for this purpose, or such a construction must be given to this one, as to enable the arbitrators not merely to appraise the amount of damages which by law the parties have a right to claim, but also to legislate as to the nature of the damages to be allowed. If there were no enactments limiting and defining the nature of their rights, the court might be driven to give the wider and more dangerous construction to this act, but if we find the allowances to be made to owners of property defined in their nature by other enactments, it cannot be that the constitution of a court for the adjudication of all or any claims for alleged damages, gives that court the power to create new rights, or to consider as good claims all which claimants choose to prefer, or any at the mere discretion of the court. All courts are established for the adjudication of claims, of some kind or other, but the nature and foundation of the claims to be allowed depend upon enactment where there is enactment, or upon rule of law equivalent to enactment, and not upon words giving jurisdiction to the court; and it is not because a court is appointed for the decision of all claims that it has authority to allow claims which the law does not otherwise recognise, and as it appears to me it is not because the arbitrators are appointed to consider any unsettled claims for alleged direct or consequent damages to property, arising from the construction of public works, that they are to be considered as having authority to create new species of claims, or new kind of damages, to which claimants are to have a right.

Now the statute of Upper Canada—3 Wm. IV., ch. 18—which authorizes the construction of the St. Lawrence canal, directly gives the commissioners the right to set out and enter upon the land of individuals, to set out and ascertain what would be necessary to be taken for the canal, and also for materials, and to agree for the purchase of the property with the owners, and also for such damages as the

owners of land may be entitled to receive in consequence of the intended erections being made *in or upon his or her respective lands*.

When no agreement is made, or when the parties cannot agree, a mode is provided for leaving the matter to arbitration, and for its being finally settled by a jury.

The damages are here confined to property taken or injured by works in and upon property: no damages are allowed for the obstruction of highways, or other rights of way. The reason for this omission is obviously, that the legislature did not contemplate the necessity of any serious obstruction; for the 31st section provides, that when it shall be necessary to cut into any highway in order to conduct any of the said canals through the same, the commissioners shall cause to be constructed, within one month, a commodious bridge, in order to re-establish the communication between the several parts of such highways.

It seems, however, to have been found necessary to provide for the alteration of highways; and by the statute of Upper Canada, 4 Will. IV. ch. 40, sec. 5, it is enacted that "it shall and may be lawful for the commissioners, when it shall be necessary for the purpose of carrying on the works, to alter any highway, &c., and it shall be the duty of the commissioners to cause to be made for the accommodation of the public a road, equally good and as convenient as the circumstances of the place will allow, and to satisfy any person or persons whomsoever for all damages which he or they may sustain in consequence of such alteration, in the same manner as other damages are ascertained and satisfied under the former act.

The sixth section of this act, 4 Will. IV., provides for the valuation and payment for houses necessary to be removed.

These acts of Upper Canada give the commissioners authority to interfere with private and public rights of property and of way, neither of which they could have done without the authority of parliament, unless under the liability to indictment or to private action: the injury to the public is avoided by making it obligatory on the commissioners to make other roads, as convenient as those

obstructed or altered; and step by step as the commissioners are authorised to interfere with private legal rights, a mode of compensation is pointed out. I do not think it ever could be imagined that the damages mentioned in the 5th section of the 4 Will. IV., extended beyond those for which the injured party would have had an action at law, were there no statute authorising the rights of the commissioners. The establishment of rival communications, or of rival commerce, which would injure that already established, was not in contemplation of the legislature, neither was loss of neighbourhood, for those through whose property the canals were not expected to run were liable to suffer from these causes equally with those especially provided with a recompense; and, moreover, it required no act of parliament to enable the commissioners or other parties to establish rival commerce, or new neighbourhoods, or new modes of transport or communication, except in so far as legal rights were interfered with.

The distinction between direct and consequential damages is well understood in law, and for both or either, actions at law may be maintained. The direct damages authorised to be inflicted and compensated for by the two acts of Upper Canada, are those arising from the works being constructed on, in, through or upon property, and by the destruction of houses. The consequent damages, for which an action on the case would lie, are those arising from the closing roads or means of communication affording access to property, and by the closing of which, individual owners would be particularly injured, so as to have a private remedy apart from the public one by indictment.

Thus we have it established, that before the act 9 Vic. certain persons suffering certain defined, direct, or consequent damages, were entitled to compensation. The abolishment of the commission under which the canal was commenced, made it necessary to provide another means through which the compensation was to be obtained, and this is all that is done by the new statute 9 Vic., nearly re-enacted by the 10 & 11 Vic.

The statute 9 Vic. ch. 37, sec. 24, with this view, directs

the appointment of arbitrators, to appraise the value of property taken, and the compensation for damages which may accrue to the owners of property, from the construction of public works, with whom the commissioners could not agree. But the commissioners were only authorized to agree to compensation for such injuries as the former statute provided for; and it cannot be supposed that the arbitrators were intended to be given any power of allowance, which the commissioners had not. The 25th section which authorizes the governor in council to refer claims to the arbitrators, expressly refers to *unsettled* claims for direct or consequent damages. These must be claims of a nature which the former statutes had provided for. They might be both direct and consequential, and yet defined in their nature; and there is therefore no pretence for saying that, by implication, the arbitrators were by the new act, invested with plenary power to assess as damages, things not authorized by the former statutes to be so considered, or any thing arising from acts of the commissioners not requiring the authority of parliament, as against the claimants. To give any such constructive authority to arbitrators, or to courts, or to the executive government, or to any power under the authority of parliament itself, would, as it appears to me, be a dangerous and unprecedented proceeding; it would be recognising, through mere construction, a delegation of wide and indefinite authority to deal with great public interests, which I cannot bring myself to believe the parliament ever contemplated.

The case of the *King v. the London Dock Company*, 5 Ad & El. 163, 6 N. & M. 390, appears to me to warrant the distinctions I have taken between injury, the remote consequence of a public work, arising from acts in themselves legally justifiable, and injury, arising from acts which require for their justification the authority of parliament. By the former, the owner of property loses nothing but what others had an equal right with himself to enjoy as circumstances permitted; by the latter, rights peculiarly his own are interfered with, and for that reason he is entitled to compensation; and it is only these latter that are considered

injuries to the estate and interest of the owners of property. If, as it is suggested on the part of the crown, the arbitrators in the present case took into consideration injuries arising to the owners of land in the village of Milles Roches arising from the diversion of traffic, or loss of neighbourhood, caused by the opening of a new road, or by a change in the carrying trade, caused by the canal, for neither of which an action at law could be maintained if there were no act of parliament on the subject, then I have no doubt they transcended their authority. But the difficulty is, that we have before us neither the particulars of the claims, if they were furnished under the 10 & 11 Vic. ch. 24, sec. 3, or as they were laid before the arbitrators by command of the governor in council; and we have no means of knowing upon what evidence, or for what damage, the awards were made. The awards merely recite the clause in the statute, and the fact that the parties respectively had preferred a claim for damages done to their property by the construction of the Cornwall canal; and they award certain sums of money to be paid for damages done to property by the construction of the canal. The affidavits filed on the part of the commissioners, go in part to negative the fact of injury by the construction of the work, except as to the stopping and obstructing the highway, and substituting for it a tunnel under the canal, by which an inconvenient access is had to the property in question. This no doubt is a substantial injury, probably not warranting the amount awarded, but for ought we know, other substantial injury may have been claimed and proved; and if these cases are to be decided by the same rules that govern private arbitrations, I do not see how the court can infer that the damage by altering the highway was the only one proved. The map before us would perhaps shew that the canal does not run through, in or upon, the premises in respect of which damages are claimed; but materials may have been taken, houses pulled down, or other injuries done, of which we have no knowledge. The affidavits state that, as the deponents believe, no other damage was sustained, except through the means of alter-

ing the road; but they do not state that none other, of a nature to constitute a legal claim, were submitted and attempted to be proved; neither do they state that injuries not capable of appraisement, or within the scope of inquiry of the arbitrators, were actually submitted or considered as submitted by the arbitrators, so as to enable us to set aside the awards on the ground of misconduct or excess of authority.

McLEAN, J. gave no judgment, having been concerned while at the bar in matters connected with this application.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Rule discharged.

MUTTLEBURY ET AL. V. HORNBY ET AL.

In an action by the endorsee against the maker of a note, a plea of payment or satisfaction, by the maker to the payee, after the note became due—is well traversed by the replication of *de injuria*.
ROBINSON, C. J., *dissentiente*.

Declaration.—The plaintiffs sued as indorsees against Hornby, the maker, and Miller, the indorser, of a promissory note for 25*l.*, due the 25th September, 1847.

Plea, by Hornby.—That on the 6th October, 1847, while Miller was holder of the note, and after the same became due, and before the indorsement of the note to the plaintiffs, and before the commencement of this suit, he paid to Miller 18*l.* in part payment and satisfaction of the note, and then and there performed certain labour and services for the said Miller, to the value of 8*l.*, to apply on and as part payment of the said note; which said 18*l.*, and the work and labour to the value of 8*l.*, amounting to 26*l.*, the said Miller, then the holder of the said note, and after the same became due, and before the same was indorsed to the plaintiff, and before the commencement of this suit, received and accepted, in full payment, satisfaction and discharge of the said note, and of all interest and damages then due and payable thereon; and this he is ready to verify, &c.

The plaintiffs replied *de injuria*.

Demurrer to replication; that it was improperly pleaded

to a plea which offered no excuse for the breach, but alleged matter of satisfaction and discharge, and denied that these plaintiffs ever had a right of action upon the note.

Durand for the demurrer. *Hawke* contra.

The authorities cited were—7 M. & W. 314; 4 Dowl. 248; 2 D. & Lowndes. 59; 10 M. & W. 367; Crogat's case, in Smith's Leading Cases.

ROBINSON, C. J.—In the last term several cases were before the court upon demurrer, bringing up the question, under what circumstances the general replication *de injuria* might be a proper answer to a defence pleaded in an action of assumpsit on a promissory note. It is necessary to obtain, if possible, clear views of the distinctions which should control the application of this general form of answer, and which seem to have perplexed the courts in England not a little, since they began to use in actions upon promises the replication *de injuria*, which before the new rules of pleading were confined to actions for torts. We therefore retain for consideration any of these demurrers on which we had doubts, and disposed only of those in which the point seemed clear. Upon examining the various decisions at leisure, we are satisfied that the case of *McCuniffe v. Allen and Meyers*, were rightly decided by us last term. There the defence pleaded was, that the plaintiff was not the holder of the note when he brought the action, having before parted with his interest in it; and we consider the plaintiff could not reply *de injuria* to such a plea. There are two or three cases that remain to be decided upon. In the present case, of *Muttlebury and Hawke v. Hornby and Miller*, the plaintiffs are suing on a promissory note made by the defendant Hornby, payable to the other defendant (Miller) on the 28th September, 1847, for 25*l.*, and endorsed by Miller to the plaintiffs.

The defendant Hornby pleads, that on the 6th Oct., 1847, while Miller was holder of the note, and after the same became due, and before the indorsement of the note to the plaintiffs, and before the commencement of this suit, he paid to Miller 18*l.* in part payment and satisfaction of this note, and then and there performed certain labour and services for the said Miller to the value or 8*l.* to apply on

and as part payment of the said note; which said 18*l.*, and the work and labour to the value of 8*l.*, amounting to 26*l.*, the said Miller, then the holder of the said note, and after the same became due, and before the same was indorsed to the plaintiffs, and before the commencement of this suit, received and accepted in full payment, satisfaction and discharge of the said note, and of all interest and damage then due or payable thereon; and this he is ready to verify, &c.

The plaintiff replies to this defence, that the defendant, of his own wrong and without the cause in his plea alleged, broke his promise, in the said declaration mentioned, &c.

The defendant demurs, and assigns for cause that the replication is multifarious, and is improperly pleaded to a plea which offers no excuse for the breach, but alleges matter of satisfaction and discharge, and denies that these plaintiffs ever had any right of action upon the note.

It is quite clear, I think, that the plea in this case does set up matter of satisfaction and discharge, and not matter of excuse; and as the note was satisfied and discharged after maturity, and while it was in the hands of the payee, the defence may be said to be in denial also of the plaintiffs' right of action, which could only accrue from a subsequent indorsement of an instrument no longer negotiable. It denies that the plaintiffs ever had a right of action.

The defendant Hornby, promised to pay Miller, or his order, in other words, him *or* his indorsee. He did not promise to pay both of them; and having paid the note to payee, at or after maturity, and while it was still in the hands of the holder, he could not be liable under the words of his contract to any one else. The debt was extinguished; there was nothing to be transferred; and the plaintiffs taking the note when overdue, and after the payee had received satisfaction from the maker, acquired no right of action. The defendant never was liable to the plaintiffs; he has no breach of promise to excuse, so far as they are concerned; and it follows therefore, in my opinion, that this is not a defence to which the replication *de injuria* is applicable.

If there is any room for doubt in this case, it can only be—first, because what is relied on as matter of discharge is not payment at the day, which would be strictly a performance of the promise, but is satisfaction after an admitted breach; or secondly, because the plea does not shew the cause of action discharged by any thing that has taken place between the defendants and the plaintiffs, but by some thing that has been transacted by a third party.

There is nothing, I think, in either exception. The admission of the form of replication *de injuria* was a novelty which the courts felt themselves constrained to sanction in consequence of the effect of the new rules of pleading. The cases of *Crisp v. Griffith*, *Solly v. McNish*, and *Noel v. Rich*, all reported in 2 Cr. M. & R., shew the scruples and hesitation which attended its introduction. The balance of convenience may be much in favour of extending the privilege of using this general form of replication, to actions on contracts as well as actions for torts; but one can hardly see how the courts can have felt that any change in the principles of pleading was forced upon them in this respect, by the adoption of the new rules: for before those rules were made, although a defendant might generally give in evidence under the general issue in *assumpsit* any thing which might shew him not liable, whether it was matter of excuse or denial, and though it was an objection usually allowed to prevail against a plea on special demurrer, that it amounted to the general issue, yet it did not by any means follow, that a defendant was never allowed to plead a defence specially in *assumpsit*, which he could have given in evidence on the general issue.

The books contain many instances of such special pleas being sustained; and in all such cases the plaintiff might have urged the same reasons for being allowed to reply generally, as he can now urge since the new rules.

The hardship of being compelled, in answer to any such plea, to select some one fact of a long statement and traverse it must have been the same in one form of action as in the other.

However, when the courts, after the new rules, deter-

mined that they must admit such replications thenceforward, as of course, in actions of assumpsit, as well as in trespass, they felt that they could only admit them subject to the restrictions which had been long established in regard to the replication *de injuria*, in those actions in which it had before been applicable; and then it became necessary always to bear in mind the rules in Crogate's case, 8 Co. 66, which meet us at every turn when looking into the law on this point, and to consider and decide how those rules would apply to defences pleaded in this kind of actions.

It has evidently perplexed the courts not a little, to lay down and preserve a well marked and intelligible line of distinction in such cases, between what can be treated as matter of denial or discharge, and what as matter of excuse: and in many decisions which their efforts to do this have given rise to, there has been a degree of ingenuity exerted, greater, perhaps, than the distinction itself is worth; I mean that it might, perhaps, have been better to have admitted the replication either in all cases, or in none, than to attempt to keep a line of distinction, which, if we may judge from the multitude of cases it has given rise to, seems hard to be settled so that it can be perfectly known and understood *a priori*, when the court will admit of the replication or when they will not. In *Purchell v. Salter*, 1 Ad. & Ell. N. S. 197, the Court of Queen's Bench was held by the Exchequer Chamber to have fallen into error in their attempt to distinguish between matter of excuse and matter in discharge, and their judgment on that point was reversed. Yet that was no hasty decision of the Queen's Bench, for the court took time to deliberate; Lord Denman delivered an elaborate judgment, tracing the origin and extension of the replication *de injuria*, citing a great number of cases, and reasoning upon many of them. If he erred, it was not from inadvertence; but it was really an error of his judgment; and he erred in company with judges very eminent for their knowledge of pleading; for the case had been argued before Littledale, Coleridge, and Williams, J. J., as well as himself; and there was no dissent from his judg-

ment. I only cite this case as shewing the difficulty which sometimes arises in the application of a well settled principle. The judgment in that case, in error however, does go very far in shewing that in the case now before us, we should have no difficulty in holding the plea to be in discharge and not in excuse, although if it had been the other way, affirming that of the Queen's Bench, it would not have tended to shew that the plea in this case is not to be treated as a plea in discharge; for the decision would then have rested on the grounds which seemed to the Queen's Bench conclusive against the replication, and which related to the peculiar nature of the defence, as being a plea of set-off, and relying upon that as a discharge, which is not in itself such, but only bars the plaintiff's action where the defendant claims to make use of his cross demand for that purpose.

The cases, which are very numerous, do furnish us, I think, with very clear grounds for decision, if we attend chiefly to the point adjudged in them, and consider the facts pleaded on which the judgment has been pronounced.

But it was not to be expected that in giving their opinions in their several judgments, the judges should always keep in view and repeat every possible exception in every case.

They have not always succeeded in guarding themselves against misapprehension; but have sometimes so expressed themselves (which is unavoidable), as to appear not to leave room for an exception, which, if it had been stated to them, we must be sure they would have admitted at once. I had occasion lately to advert to Lord Tenterden's observation in *Thorp v. Thorp*, 3 B. & Ad. 582, that "the language used in delivering a judgment must, like the words of any other speech or written instrument, be taken with reference to the facts upon which it turns; or it may otherwise be applied to purposes quite different from those for which it was intended." Taking care to observe this caution, I see nothing in any adjudged case to make me hesitate in determining the replication which we are considering, to be inadmissible.

In *Purchell v. Salter*, 1 Ad. & Ell. N. S. 218., Tindal, C. J., in delivering the judgment in the Exchequer Chamber,

after noticing the principle on which such replications have been always admitted, in answer to matters of justification or excuse, pleaded in actions of trespass, says: "But there is a manifest distinction between such pleas, and those which rely upon matters of discharge, *and extinguishment of the right of action*; as to which latter class, no authority has been cited to shew that the general form of traverse is allowed. Thus to a plea of *payment*, or accord and satisfaction, or release, or of *any matter which extinguishes the right to sue*, both the rules of pleading and the course and practice from the earliest time, require the plaintiff to make a traverse of, or to deny the material fact stated in the plea which *constitutes the discharge or distinguishment of the right of action*. And the court considered that the right of action as between the plaintiff and defendant, in that case of *Purchell v. Salter*, was shewn to be discharged or *extinguished* by the existence of a cross demand which the defendant advanced in his plea, as a set-off; and that not a demand against the plaintiff in the action, but against his agent from whom the defendant had bought the goods, for which the plaintiff sued him, believing that they were the goods of the agent, and not knowing the plaintiff in the transaction.

Now keeping in view the decision of the judges of the two courts of Common Pleas and Exchequer, what they held to be an extinguishment of a debt, and how they applied it, as disabling a plaintiff from replying *absque tali causa* to such a defence, consider what it is that the plea sets up in the case now before us; not merely the existence of a cross demand, as in *Purchell v. Salter*, which the defendant might or might not have chosen to set-off; but an actual discharge of the very cause of action under the contract by accord and satisfaction. The first doubt which has been suggested on this part of the case is, that this is not performance of the contract, but admits a non-performance. That is true, but it is equally a discharge or extinguishment of the cause of action, more directly so than set off can be. It is only the language which some judges may have unguardedly used in delivering their judgment,

I think, that can give the least reason for doubt on this point. Several cases, I am aware, may be found, in which a judge has said that were the plea either denies the contract or asserts performance of it, the replication *de injuria* cannot be allowed—which is true so far as it goes: but we must not infer from such an expression, that in all other cases it may be used; for there is a third restriction which stands on just as clear ground upon authority, and that is where the defendant by his plea admits the contract, and that he has not performed it, but at the same time shews that he has in some measure satisfied the plaintiff for all damages occasioned by his non-performance. In such a case the cause of action is as fully extinguished as by payment at the day, for a double satisfaction can never be recovered; the cause of action is as clearly discharged and gone, or, to use the precise expression of the court in *Purchell v. Salter*, in error, 1 A. & E. N. S. 218, is as fully *extinguished* as by a release; and the plaintiff has no more right to sue the defendant upon it, than if he had never entered into such a contract.

There are many cases in which this point is not brought into view, because the case did not require it. The courts in laying down a principle, do not always state every possible modification of it, and every exception: some are not noticed because they are not in question in the cause; others, because they are so plain and well settled that they are not in question in any cause. A judge, in pronouncing a judgment, might happen to say that all agreements respecting an interest in land, and all agreements not to be performed within a year, must be in writing and signed by the party to be charged; but if we were to imagine that he meant us to understand by this, that no other agreements were required to be in writing, we must not suppose that he has forgotten most of the provisions of the Statute of Frauds.

That a plea which admits non-performance, but goes to shew the cause of action extinguished and discharged by satisfaction made and accepted after breach, cannot be traversed by a replication *de injuria*, is as plain upon the authorities as that a plea of *non fecit*, or of payment in an

action on a note, cannot be so traversed; and I assume it to be quite clear, that if the payee in this case, who received satisfaction, had never transferred the note, but were himself suing Hornby (the maker) upon it, he could not reply *de injuria* to such a plea as has been pleaded in this action by his indorsee.

Then the other point in this case is, that here it is not the payee (the person with whom the original contract was made), but his indorsee, who sets up the defence; but on this point also, the case, I think, is quite as clear as on the other. Indeed, the case of *Purchell v. Salter* is more than an authority on both points; and is the more to be relied on because it was decided in error, and with all the deliberation which would of course be applied before overruling the judgment of another court.

There the defendant, being sued for goods sold and delivered, pleaded in effect this—"I admit that the goods bought by me belonged to you (the plaintiff), and that I bought them of your agent; and I cannot deny that the law implies a contract on my part to pay you. I admit also a breach of that contract, for I have not paid you. But my excuse is this—that when I bought the goods, I did not know that they belonged to you, and knew nothing of any agency; but I supposed that the party of whom I got them, was selling me his own goods. He owed me when this action was brought, and still owes me as much as the price of the goods; and as the law gives me the privilege, under such circumstances, of setting off against your demand the debt due to me by him, I decline for this reason to pay you for the goods." I think I should have fallen into the mistake of considering this matter of excuse rather than of discharge, which is what the Court of King's Bench unanimously decided; but the judges of the Common Pleas and Exchequer have determined that it is more properly matter of discharge. They could not deny that there was a contract unperformed, and so a *prima facie* right of action; but they considered that the law gave to the vendee of goods, under such circumstances, a right to treat a cross demand, held by him against the agent, the same in effect as if it

were due by the principal—to make it, in other words, a mutual debt; and that being as it were a mutual debt, the statute gave the right to set it off; and that, as the defendant had availed himself of the right, and had pleaded the set-off, he shewed (though by something that had taken place between other parties) the debt thereby in fact extinguished and barred.—7 M. & W. 321. So they held that he was not to be looked upon as relying upon any *excuse* for not performing; that he was not desiring to be still excused by some collateral matter, from ever satisfying the demand; but that he was pleading what in fact did satisfy and extinguish it, shewing his contract performed in substance, though not on the day and not on the terms of the contract—2 Cr. M. & R. 159.

The discharge, to come within this rule, must as I take it, be a discharge arising from satisfaction, or from a legal release by the party; it must not be a mere discharge by the laches of the other party, as was the case in *Whitehead v. Walker*, 9 M. & W. 506.

But when there has been an actual satisfaction given and received, the cause of action is discharged; and there can be no longer a right in any person to sue upon the security; that is, no actual right to sue, and no apparent right even, after the defence has been stated.

In *Crisp v. Griffiths*, 3 Dowl. 754, Park, Baron, is made to say, “there are three cases where *de injuria* would not be a good replication: *first*, where matter of record is relied on; *secondly*, when the plea claims an interest; *thirdly*, when the defendant derives authority immediately from the plaintiff.” One might suppose that the learned baron meant that these were the only restrictions; yet none of them was applicable to the case then before the court, which was a replication to a plea in an action on a note that the plaintiff had drawn a bill on defendant for, and on account of the said note, which bill defendant accepted and delivered to plaintiff, who took it for and on account of the note. The court held the plea bad for defects, which they pointed out; but they considered the replication also bad, and Parke, Baron, observed that the matters pleaded were

not in excuse for breaking the promise, but were alleged as accord and satisfaction. "In fact, there is no excuse or defence," he said, "to the original breach."

I find some cases in which the courts have said that the matters pleaded were what had happened between third parties, and could only be treated as matters of excuse; but I do not understand them from that to mean, that to any defence arising from facts which have taken place between the plaintiff and the third party, *de injuria* may be replied.

I am quite sure they cannot mean that; and I have seen, indeed, no such expressions used except in cases where the defence pleaded, besides being founded upon something which occurred between other parties, was also in itself clearly only matter of excuse; as when the defendant, not denying the contract, nor affirming that he had performed it, nor that he had given to the plaintiff, or to any party previously entitled to sue, full satisfaction of all damages occasioned by reason of his non-performance, had merely set up some matter which happened to have taken place between other parties, as excusing him from paying the money or making satisfaction to the defendant, or to any one. *Purchell v. Salter* is *inconsistent* with the existence of such a distinction as I have last alluded to.

But the plea in the case before us is not only in discharge and extinguishment of the ground of action under the contract, but it is also in express denial of the plaintiff's right of action. It shews the note paid at maturity to the only person entitled to receive payment, or rather after maturity, which is the same in effect when it is pleaded in satisfaction, and equally extinguishes the debt, as if the note had been paid on the day it fell due. A note so satisfied by the maker is no longer a negotiable instrument, and a person taking it from the payee after it has been so paid, acquires no legal right of action against any one.—5 Bing. N. C. 494; 3 Ad. & Ell. N. S. 465.

In *Burbridge v. Manvers*, 3 Camp. 195, L'd Ellenborough says; "I agree that a bill paid at maturity cannot be re-issued, and that no action can afterwards be maintained

upon it by a subsequent indorsee." It is clear therefore that this plea not only relies upon the cause of action being wholly extinguished, but it denies that the plaintiffs ever had a right of action; and it offers no excuse for any non-performance of any promise to him. In some of the cases, the court have said that when the plea admits a *prima facie* liability it is to be taken as pleaded in excuse; but I understand the learned judges to mean nothing more by that expression, than that where the facts stated in the plea, admit not merely an original but a continued liability under the contract, so far as the mere language of the contract itself is concerned, and seeks to avoid it by collateral matter not going to the very extinguishment of the ground of action, then the plea is in excuse. Pleas of fraud in obtaining the note, want or failure of consideration, and illegality of consideration, are defences of that kind; but no plea that shews the contract satisfied or discharged, and the defendant no longer liable to any one under it (taking the contract as having been binding in its strict sense), seems to me to come under that class.

No doubt in the case before us, if we should look at nothing but the note and indorsement, they would shew a *prima facie* liability; but so also would a note if sued upon by the payee himself shew a *prima facie* liability; notwithstanding the note had been paid to him at maturity, or after he had released the maker from all actions on it under his seal. *Prima facie liability* is not spoken of in any case with reference to what the bare note itself discloses, and nothing more. The question upon the admissibility of the plaintiff's replication, does not arise upon his own declaration, but on the defendant's plea; and we are to ask whether the facts pleaded as a defence admit a *prima facie* right of action, not whether the mere words of the promissory note, or of the declaration upon it, shew a *prima facie* right of action. It may be said with truth that the plea does admit a *prima facie* right of action when it admits the note and sets up neither payment nor satisfaction, but gives an excuse only for not paying; but it is otherwise when the effect of the plea is to shew all right of action extin-

guished under the terms of the contract, while the note was in the hands of the payee, and after its maturity, so that no one could afterwards set up any right of action under it, because he could acquire no interest.

I refer to the reasons and decisions of the court in *Scott et al. v. Chapelow*, 2 Dowl. N.S. 78, and in *Schild v. Kilpin*, 8 M. & W. 675—in which Alderson, B. says: "This replication is only good when the plea admits a breach of the promise stated in the declaration, and alleges circumstances whereby that breach is excused. To a plea whereby *that breach is discharged*, it is not a good replication. Now what is the breach in this declaration? It is the non-payment of the bill according to its tenor and effect; now the payment, according to the tenor and effect of a bill, is a payment to the holder; i. e., to a person to whom it was originally made payable, or *to whom it has been transferred by a valid endorsement and delivery*." That language decides the case before us; for it surely cannot be said that the plea which we are considering admits the non-payment of the note to any person to whom it had been transferred by a valid endorsement. I refer also to *Jones v. Senior*, 4 M. & W. 123; *Cowper v. Garbett*, 13 M. & W. 33; *Haitley v. Manton*, 5 Ad. & Ell. N. S. 247; *Salter v. Purchell*, 1 Ad. & Ell. N. S. 197, 210; and *Solly v. McNish*, 2 Cr. M. & R. None of them are decisions precisely in point, but they all support, I think, the conclusion I have come to. I have met with no case which can be taken to have decided the contrary; though there is I acknowledge, much in the language of the judges, which has on the first impression a contrary bearing. But we should be on particularly unsafe ground, in resting much on the mere language of the judges on this rather perplexing question, where it goes beyond what the case in judgment called for.

The cases abound in expressions which it would be impossible to reconcile, if we did not take them in connection with the facts under discussion, and expound them accordingly. In *Parker v. Riley*, 3 M. & W. 238, one of the learned judges is made to say expressly, that the illegality of the transaction "*is not mere matter of excuse*;" which if it

be true in that case, it can only have been because the claim was not founded on an express but an implied contract. There is no case, I think, to be met with so much resembling the present in its facts as *Mitchell v. Cragg*, 10 M. & W. 367; 5 Bing. N. C. 594; 5 Ad. & Ell. 972—but there the court held the plea bad, and gave judgment for the plaintiff on that ground. The replication (which was not in fact “*de injuria*,” but a kind of informal general traverse) was not noticed in the judgment; but from observations of Baron Parke during the argument, he appears to have thought the replication *de injuria* might have been good. It was certainly without much consideration that he spoke of it; for he said the case resembled that of *Isaac v. Farrar*, 1 M. & W. 65, to which it was most unlike, while it did resemble in principle, as the counsel for the defendant remarked, the cases of *Schild v. Kilpin* and *Salter v. Purchell*; as that now before us does also.

In the case of *Isaac v. Farrar*, the defence pleaded was, fraud and want of consideration between any of the parties, which forms one of a class of cases always held to stand on peculiar ground. In *Mitchell v. Cragg* the defence was satisfaction; and if in that case the replication had been the ordinary *de injuria* and the court in their judgment had upheld it, we should have had to consider whether such judgment ought to prevail as an authority; even that in *Purchell v. Salter*, which, though rather before it in point of time, was the judgment of the court in error—to which, in my opinion, any judgment supporting a replication *de injuria* in *Mitchell v. Cragg* would have been opposed.

In *Barnes v. Price*, 1 M. Gr. and Scott, 215, the counsel while arguing in support of a replication *de injuria*, in answer to a plea very different from the present, thought it material to his argument to refer to this case of *Mitchell v. Cragg* and to Baron Parke's intimation as reported in it, that the plea there was to be regarded as a matter of excuse. Upon which Mr. Justice Creswell observed: “In that case there was no default as to the plaintiff; the alleged satisfaction was made before the bill was endorsed to the plaintiff.” I infer from that remark, that Mr. Justice Creswell did not

assent to the intimation thrown out by Baron Parke—that *de injuria* could have been replied in *Mitchell v. Cragg*—though he may have meant the reverse.

In *Crogate's* case, which is always referred to in discussions on the replication *de injuria*, and in which is laid down, in what cases that form of pleading is not admissible; nothing is said of pleas in satisfaction and discharge; though these might occur as well in actions for trespass as in *assumpsit*. But this additional exception is nevertheless now clearly admitted and established.

Little is anywhere said of it in books or cases, antecedent to the late period when it came to be applied to defences in actions of *assumpsit* and debt; but in those cases it has been uniformly held that matter in satisfaction and discharge cannot be so answered; for instance, payment, or accord and satisfaction, or release. And this I take to be upon the clear principle that it is not matter of excuse, but denies *an existing cause of action* in the plaintiffs, and denies it not on account of fraud or illegality, or want of consideration, or breach of faith, or of some collateral understanding—which may all stand with the fact of an express contract in form, and of an apparent liability under it; but denies an existing cause of action, by shewing the contract performed or discharged, either not admitting a breach, or by admitting a breach and shewing an accord and satisfaction of the cause of action arising from that breach.

That to such a defence the plaintiff could not reply *de injuria*, seems a plain corollary from what had been said in *Crogate's* case and the older cases; though no such exception as payment, or release or satisfaction, is noticed in them—1st, because *Crogate's* case negatively excludes the replication in such case, for such a defence is not *matter of excuse*, which all the authorities say the defence must be; and 2ndly, because it falls within the principle announced in both old and modern cases, that whatever directly denies the right of action cannot be so answered, unless the denial is grounded upon fraud or illegality, or some collateral matter of that kind—not denying the fact of the contract, nor setting up performance, discharge or satisfaction.

Thus in *Taylor v. Markham*, Yelverton, 150, the court says, that "when the plaintiff by his declaration makes title to anything, and the defendant will plead another thing in destruction of it, *or of the plaintiff's cause of action*, he ought to reply specially and shall not say *absque tali causa*."

In *Cockerell v. Armstrong*, Willes, 99, the court affirm this principle in the same words.

Then here the plaintiff sues as indorsee of a promissory note, whereby the defendant promised to pay A. B., or his order, a certain sum of money; the defendant pleads that while A. B. held the note, and after the note was at maturity, he paid the money to him, according to his promise, and that A. B., after the note was at maturity, and after it had been so paid and satisfied according to its tenor, indorsed it to the plaintiff.

The question is, whether it is correct to call that matter of *excuse* for the defendant not fulfilling his contract and for not complying with an *admitted liability to pay*, and so a defence to which *de injuria* may properly be pleaded; or whether it is not more correct to say that it is a *pléa in destruction of the plaintiff's cause of action*, in denial of the plaintiffs' right under the contract, which the defendant admitted, and on that ground not to be classed with matter of excuse; and secondly, matter of satisfaction also, and extinguishment of all right of action under the contract, and on that further ground distinct from excuse for an admitted breach.

The principle I take to be this, that where the actual making of the contract is admitted, and that contract imposes an obligation on the defendant in favour of the plaintiff—which obligation the defendant has not fulfilled, nor been released from it, nor made satisfaction for the breach of it, but seeks to avoid it by shewing something apart from the contract, as imposition, or illegality, or want of consideration, or breach of faith in the use made of the note—there the defence may be answered by this general form of traverse. So far, I think there is no doubt. But then, when the courts speak of what is *prima facie* admitted, I do not understand them to mean merely what the contract on the

face of it alone would import, nor what the plaintiff's own statement of his case charges; for all that would equally appear where payment or satisfaction, or even the plea of *non fecit* is on the record; but the question is, what the defence pleaded can be said *prima facie* to admit, and what that denies or sets up against the plaintiff's right of action; for the plaintiff is not called on to answer his own declaration, nor merely what appears in the promissory note; but he is required to answer the defence pleaded.

We are to look at that, and see if it can be said with truth, that it relies on mere matter of excuse for not complying with a liability which the defendant has admitted as resulting from his contract. Does the defendant admit that any liability ever existed on his part to these plaintiffs under the contract, taking that in its strictest sense, and admitting that he was bound to do all that he promised? Clearly not, I think. The defendant had promised to pay to A. B. or his order a certain sum in 90 days; not to A. B. *and* any person to whom A. B., after receiving the money himself, might require him to pay it a second time.

When therefore he shews that he paid the money to A.B. on the day he shews performance of his promise, or if after the day he shews satisfaction for the breach, he "*pleads something in destruction of any further right of action,*" for he shews that the note was not negotiable when A. B. assumed to transfer it; that A. B. could not impart to any one a right to sue upon it; and this without reference to anything extraneous to the contract and to the obligations which it imposed, taking it in its strictest sense, and without resorting to anything in derogation of it.

Taking what the plea affirms to be true, the plaintiff cannot possibly have, and could not ever have had any right of action against the defendant under the contract on which the defendant is charged.

The utmost that can be said is, that if we look at nothing but the note, or attend to nothing but the plaintiff's statement of his own right of action, then there is a *prima facie* right of action against the defendant under the contract. In other words, there is a *prima facie* right of action until the

other side has been heard ; but the other party being heard, he has pleaded a defence which is in destruction of the plaintiff's alleged right of action under the contract ; and it is that defence which the plaintiff must reply to. The defendant says in substance, " I have no breach of my contract to excuse," (which is the wrong or injury charged in *assumpsit*), " I never was liable to you under or in consequence of my contract ; and never had anything to perform to you. There might have been an apparent liability until I had pleaded, but my plea shews that which leaves no appearance of liability under my contract ; for the payee of a note who has been paid at maturity can set up no second contract binding upon me after the first has been cancelled by performance or satisfaction."

The facts which are stated in this plea might have been made to appear on the note itself. If we can suppose, for instance, that the payee had made his endorsement thus : " Pay to E. F. the amount of the within note which you have this day paid to me in full," and if the endorsement had been so stated in the declaration, there can be no doubt that the declaration would have shewn that the plaintiff could derive no title as indorsee of this contract ; that he has not, and never had any cause of action ; and this without resorting to anything in impeachment of the contract itself, but allowing to it its full binding effect according to its letter and spirit. Then, I think, the effect, of the same facts, when brought out in the defence, must be the same ; and being so, they clearly establish, not that the defendant for any cause broke a contract with the plaintiff, but that he never was bound to him by any contract.

The plaintiff, however, contends that he is entitled to treat the plea as a matter of excuse, and on two grounds.

His first reason (if I understand him rightly) is, that a *prima facie* right of action is admitted by the defence : for that the plea does not deny the making of the note, or the indorsement, and so is not a plea in denial of anything necessary to the plaintiff's action.

The answer to this is, that it is true the plea does not deny anything affirmed in the declaration, and so is

not in that sense *a plea in denial*; but that it states facts in denial of the liability, admitting the contract made by the defendant to have been binding, and allowing it its full legal effect; and that it is in that sense the rule is to be understood, and not by confining the word *denial* to the statements in the declaration.—8 M. & W. 674; 4 Dowl. 254.

Secondly. That if the pleas were not in denial of the plaintiff's action, that alone would not determine the question; because, if the defence consists in matter of satisfaction and discharge, though not in denial, that is equally conclusive against the use of the replication; and this defence does consist of matter of satisfaction and discharge in the strictest sense.

The plaintiff's *second* reason is, that the fact which is relied upon as denying or destroying the right of action, did not take place between the plaintiff and the defendant, but between the defendant and another party.

The answer to that is—that the argument assumes that no defence which could be set up—as release, payment, satisfaction—can be treated as otherwise than matter of excuse, unless it occurred between the parties to the suit; though it may shew conclusively that the contract, out of which alone the plaintiff pretends to derive any right to sue, is annulled and cancelled, and was so annulled and cancelled before he could pretend to have had any interest in it.

But no judgment of any court, nor the language of any judge, nor of any book that I have met with, lays down any such principle. There are one or two cases in which judges have remarked, “this is mere matter of excuse, by reason of something stated to have occurred between the defendant and other parties;” but I have already said, that I find no such words used except in cases where the defence relied upon, was what the courts have always treated as matter of excuse merely—such as illegality, or want of consideration; and when the fact happened to be that such defence arose out of transactions with another party, it was on that account naturally and properly so spoken of, without the court meaning to admit that if the same matter

of excuse had been set up as existing by reason of transactions between the plaintiff and defendant, it would have made any difference in the principle or its application. It could not, if it would equally have been matter of excuse.

In *Simons v. Lloyd*, 7 Ad & Ell. N. S. 401, Lord Denman says: "the plaintiff replies that the defendant broke the promise without *the cause or excuse* by him alleged, no *cause or excuse being alleged*." Is not that fully applicable here? The plea admits no promise to plaintiff, but a promise to payee, or his order, and a satisfaction of the payee before the plaintiff acquired the note. Does that statement shew a promise to the plaintiff, and admit its breach? or does it not rather shew the facts which discharged the promise made in the contract, before the plaintiff had any connection with it; and thus shew that the promise never enured to the plaintiff.

Indeed, the case of *Simons v. Lloyd* is material to be considered upon this question, for it shews very plainly that when the courts in their judgments on this point of pleading lay it down as a principle, that a plea which is in denial of the plaintiff's action must be specially traversed, they do not speak of pleas in denial, in so confined a sense as to mean only pleas where the defendant denies some material allegation in the declaration, which no doubt is what is technically intended by a plea *in denial*; but they mean pleas which set up a defence inconsistent with the existence of any right of action; or, as it is expressed in some of the cases in destruction of the right of action; for in *Simons v. Lloyd*, the plaintiff sued for services as an attorney, the defendant pleaded that he had not delivered a bill of his fees as required by the statute, and the court treated that as a plea in denial of the plaintiff's right of action, to which *de injuria* could not be replied; though the plea certainly did not traverse any allegation in the declaration, and was not in that sense a plea in denial. The same may be said of many other cases in which the exception has been sustained.

Freakley v. Fox, 9 B. & C. 130, 4 M. & R. 18, gives an instance of a defence which would stand on a similar footing.

It was a singular case. The defendant was sued as

maker of a promissory note payable to one Reeves or order, of which plaintiff was indorser, and he pleaded that Reeves had afterwards made him his executor, and relied upon that as amounting in the law to a release of the debt, though he had as executor endorsed the note to the very party who sued upon it. The plaintiff replied special matter to this defence, and the doctrine of replications *de injuria* did not come under consideration, the case being decided indeed, before that form of replication was in use in such actions. But I should conceive that to be a case in which the plaintiff would now be obliged to traverse the matter of such a defence specially.—4 M. & Ry. 18; 6 Dowl. 708; 3 Bing. N. C. 359.

Herbert v. Sayer, 5 Ad. v. Ell. N. S. 965, has, at first, the appearance of supporting the replication in a case like the present, but not when it is considered; for it amounts to nothing more than that the note was sued contrary to a collateral understanding, that it was only to be kept as a security till another debt should be paid; and the plea went on to shew that this other debt had been partly paid, and the remainder tendered; and that yet the plaintiff against good faith, had put the note in suit. The plea did not rest, as this does, upon the fact that the note itself had been satisfied. The cases were quite dissimilar. The defendant does not by his plea seek to evade his strict liability under the instrument, by setting up that he was imposed upon when he entered into the contract, or that anything has happened since but that which is strictly matter of discharge; admitting that he was ever liable, but averring that he has borne the full burthen of that liability, and that the plaintiff has in consequence no right to sue him upon it. He says in effect, "I fully admit that I promised to pay to Miller, or his indorsee, twenty-five pounds on a certain day; I admit that that promise was binding upon me, but it was not a promise to pay Miller *and* his indorsee, but Miller *or* his indorsee. I affirm that I paid Miller after maturity of the note the whole sum for which I was liable under it; whereby all claim upon me, by him as the holder, was extinguished, and the negotiability of the note destroyed. He had no right to transfer

it after it was so satisfied, nor you to take it; and if my plea is true, you have not, and never can have had a right of action upon it." And he might add, "it is not that you have no right of action by reason of something besides the strict letter of the contract, and affecting it on the ground of good faith, illegality, or anything of that kind; but you have no right of action because I had satisfied my contract to the person having at the time the legal right to claim its performance, and can be no longer liable upon it, taking it in its strictest sense. The question is not, whether the mere statement that I made the note, and that Miller endorsed it, imports a *prima facie* right of action before the defendant has been heard; no doubt it does, and so would the note have imported a *prima facie* right of action, if Miller had sued upon it after receiving payment; but the question is, whether if what I have pleaded be true, you have a *prima facie* right of action; if not, you must meet my defence by a special denial, for your replication professes to be an answer to the matter I have pleaded, and we are not to ask what the record imports without the plea, but what the plea imports."

And it is plain that this plea offers no excuse for an admitted breach of any contract with the plaintiff, for it shews no semblance of a liability to him, unless the endorsement over of a satisfied note after maturity can convey a legal right of action against the party who has paid it already. *On the face of this plea*, to which the plaintiff is relying, there is surely no more an admission of a *prima facie* liability to the plaintiff than there would have been if the plea had shewn a satisfaction made to himself; in both cases, looking only at the note and indorsement, there would be a *prima facie* liability; in both, when the plea is heard, there is no liability admitted, by reason of matter of discharge.

The line of distinction between the defence pleaded here and those defences where the plea admits an apparent legal right of action, so long as the attention shall be confined to the contract actually made, and to the inquiry whether it has been fulfilled, satisfied, or discharged, but seeks to afford a good reason why the defendant should notwith-

standing be relieved from his strict liability; the distinction, I say, between such cases and the present is manifest; and I do not find that it has been in a single case broken in upon; though the language of judges unguardedly used, or inaccurately reported in some cases, may be such as to shew that it may not always have been steadily kept in view, in discussing the point. The decisions, however, have preserved the distinction clearly, though it may not have been attended to, in all that has been said on the subject.

There is much to induce hesitation in disposing of this question, because some of the adjudged cases are inconsistent with each other, and many more have the appearance of being so, but are not so in reality when they come to be carefully compared; and when the points decided in them are taken into account, rather than the precise terms in which the judges are made to convey their decisions.

The best opinion I can form is, that the defendant is entitled to judgment on the demurrer. I am quite sensible that I have expressed myself at unnecessary length, and with useless repetitions, into which I have been led, because, happening to differ from the rest of the court, I have felt it to be due to my brothers to state the grounds of my opinion more particularly.—4 M. & Ry. 18; 5 Bing. U. C. 594; 4 Dowl. 248; 1 Dowl. N. S. 600; 8 M. & W. 63; 1 Q. B. R. 518, 522; 3 Camp. 513, note; 1 M. & W. 95; 3 Dowl. 453; 5 Moo. Sc. 97; 1 Q. B. R. 207; 9 Dowl. 496; 7 M. & W. 174.

MACAULAY, J.—The question is, whether the plea is in denial or in confession and avoidance; and if the latter whether it is in excuse or in discharge. If in denial or discharge, *de injuria* is not a good replication; if in excuse or justification, it is.

As applied to actions of assumpsit, this replication is only allowed when (according to its import) it traverses the *cause* or matter of excuse pleaded in justification of the alleged non-performance, or breach of contract, or promise alleged.

The distinction between the different descriptions of pleas above mentioned will be found well explained in Stephens

on Pleading, last edition, p. 57, 150, 169, 229, and note 20, and p. 462; and by E. V. Williams, *arguendo* in Cowper v. Garbet, 13 M. & W. 33; and the application of the replication *de injuria* to actions of assumpsit may be traced in 3 Dow. 753, Crisp v. Griffiths; 5 Tyr. 632, Noel. v. Rich, and subsequent cases.

A promissory note, payable to the payee or order, may be transferred by endorsement either before or after due, (3 M. & S. 95), with this difference, that if endorsed after becoming due, the indorsee takes it subject to all its equities, as between the maker and the prior party.—1 Campb. 19 139; 3 T. R. 80; 7 T. R. 429; 1 Taunt, 224; 1 Stark. 483; 3 Dow. 252; 4 M. & G. 101; 2 Q. B. R. 459; 12 Jur. 79; 4 M. & G. 101. When thus transferred, the indorser is likened to the drawer of a bill, and the maker to an acceptor, and the indorsement is *prima facie* presumed to be for value.—3 Dow. 453, Reynolds v. Ivey; 5 M. & Scott, 97, Dorme v. Chilford; 14 M. & W. 733, Bartlett v. Benson. In declaring thereon, the indorsee has merely to state the making of the note by the defendant, and its indorsement and delivery to him by the payee; whence it is inferred that he is the holder, and a *prima facie* liability and promise to pay him as such holder are implied.—7 T. R. 596; 5 E. 476; 7 C. & P. 408.

The forms of declaration, under the old and new rules do not materially vary, though formerly it was usual to aver that the note was transferred before payment, while in the new forms such averment is omitted, which shews that it is not material to be stated. To such a declaration the defendant cannot now plead non-assumpsit, but must deny or traverse some matter of fact, as the making or indorsing, &c., as well explained by Pollock, C. B., in Cowper v. Garbett, 13 M. & W. 33, and by Parke, B., in Burnett v. Bull, 11 Jurist, 1067; and see 16 Law Jl. Ex. 246, Langsdale v. Clarke; 7 Bing. N. S. 633.

Pleas in denial, whether directly or only argumentatively so, shew that no contract ever existed by directly or indirectly traversing the facts, or some material fact, necessary to establish it. Pleas in discharge admit the contract to have once existed, and to have been binding, but show the

defendant exonerated (by something *ex post facto*), either from the contract itself before breach, as by release, a substituted agreement, &c., or from the breach thereof after being broken, as by release, accord and satisfaction, payment in satisfaction of damages, &c.

Pleas in excuse or justification must confess both a contract and breach, and avoid the same either by matter collateral to or *dehors* the contract, which destroys its legal validity, or matter *ex post facto*, arising before the breach, which justifies or excuses the non-performance of the contract or promise alleged; and it is of the essence of the latter description of plea that it should, in the matter of it, confess or concede a *prima facie* or colorable right of action to the plaintiff on the facts stated by him; in other words, admit the facts alleged in the declaration, and at the same time avoid them; that is, avoid the *prima facie* legal effect thereof, by shewing that though ostensibly and in point of fact the plaintiff has a colorable or *prima facie* right, yet that in point of law he never had any such right of action. Consequently a plea in excuse always in effect denies any right of action, while at the same time it admits all the facts alleged in the declaration as constituting such a right *prima facie*, that is, admits the facts, but avoids their legal effect as giving a valid right of action.

It is not enough to make it a plea in denial, that it denies any right of action, by shewing that the plaintiff has no cause of action—that could be a denial in matter of law, not in matter of fact.—See 1 Bing. N. S. 633; 10 M. & W. 397. To be in denial, it must deny the contract in fact, or the facts whence it is by law implied. It must deny facts, and not merely the right of action in point of law *prima facie* resulting from the facts. A plea admitting the facts to be true, and avoiding only their legal effect, is not in denial, but in confession and avoidance.

Now here, the facts which constitute the contract declared on, are the making and endorsing of the note. These facts, until contradicted, shew a *prima facie* right in the plaintiff to recover, and the law implies therefrom a legal liability and a promise to pay the plaintiff, which, on the

face of the declaration, is imported to be according to the tenor and effect of the note.

The plea does not, directly or indirectly, deny any of the facts either expressly alleged or necessarily implied; but admitting them, avoids their legal effect, by matter *dehors* arising between the making of the note and its transfer to the plaintiff, and of which (if that could make any difference) it is not asserted that the plaintiff had any previous notice. The matter pleaded would be clearly in discharge after breach, if the original payee were the plaintiff; and it constitutes a good defence in law, as against his indorsee, because he took the note after it was due, though he may have paid value and received it without notice of its having been previously satisfied as pleaded; but as between the present parties, it is, in my humble opinion, matter of excuse or justification, matter which (not denying, either expressly or argumentatively, any fact alleged in the declaration) avoids the validity of the indorsement in law, and thereby justifies the breach, by shewing new facts collateral to those alleged, whereby their legal effect is destroyed, so that no right of action ever accrued thereby to the plaintiff.

Upon the necessity of a plea in confession and avoidance, sufficiently confessing in the matter of it a *prima facie* or colorable right, I would refer to Stephens on pleading, 233-46; Solly v. Neish, 5 Tyr. 625; 2 Bing. N. S. 359; Whittaker v. Mason; 1 M. & W. 166, 183; 1 Q. B. 218; Tyr's Pleadings, 600. The rule applies to pleas in discharge equally with those in excuse.

In my opinion, the present plea does, in the matter of it, sufficiently admit a *prima facie* or colorable right of action, in the plaintiff. By admitting a *prima facie* right of action, I understand and mean, admitting the facts which, if true, constitute such right in law, and then, without controverting them, evading their legal effect by the allegation of new and independent matter. It appears to me, the plea admits a contract in fact between the plaintiff and defendant *prima facie*, so much as if the payee was plaintiff and the same defence pleaded, which would then be in dis-

charge by way of accord and satisfaction; and as much as if, in an action between the original parties, the defence was fraud, illegality, or want of consideration, &c.; of the latter kind there are several adjudged cases, and I must confess that I cannot in principle distinguish the present from them. If in those causes *de injuria* was admissible, its admissibility in this seems to me to follow as a corollary. They are, certainly, not precisely in point, and in their facts and circumstances are no doubt distinguishable. In all of them, contracts in fact are unequivocally admitted, and only defeated by reason of illegality or some other collateral cause; and it is not clear that, as between the original parties (as some were), *de injuria* might not be replied to the matter pleaded, whereas here in that event it clearly could not. But still the principle appears to me equally applicable. Restricted to the immediate transaction between the payee and the plaintiff, the plea would merely amount to an averment that the note was endorsed after it was due, which of itself would be no defence either on the part of the payee, if sued on his endorsement, as he might be, and indeed as he is, or of the defendant.—See the language of Creswell, J., in *Scott v. Chapelow*, 4 M. & G. 336. This shews that merely alleging a transfer after due, is not enough; the defendant must further shew payment or satisfaction before such transfer. To support the defence, both must concur, i. e. a payment or satisfaction, and a transfer afterwards and after due. Neither alone would be any defence; both united make a good defence in law. They do not, however, even indirectly impeach the validity of the note as payable to order, with the legal consequences, one of which is a right in the holder to transfer it, though over due. The plea merely impeaches the validity and binding effect of the endorsement to the plaintiff, not by denying it, or by denying that (the payee being in possession of the note) it was in fact endorsed to the plaintiff, or that such endorsement was *prima facie* valid, but asserting new collateral matter, that in law invalidated such endorsement—the same being made after the note was due. Although the same facts would have been unavailing as a

defence, if they had existed, and the note had been transferred (for value and without notice, neither of which is denied here) before it became due.

This plea, in the matter of it, is affirmative and does not deny any of the facts, which being admitted, create a *prima facie* liability—but, consistently with the admission thereof, alleges new matter, whereby those facts, true though they be, cease to be, or are shewn not to be, or even to have been valid and binding in law. It may be well tested by prefacing the plea with a special inducement, reciting all the facts and legal consequences thereof, expressed in or implied on the face of the declaration, and then pleading the collateral facts relied upon as a defence, and whereby the declaration, though confessed *prima facie*, would be avoided.

It is not sufficient to make it a plea in denial, that the defendant having already satisfied the note to the payee, was discharged from the promise contained therein, and the breach thereof, and required no *excuse* for not paying it over again to the plaintiffs.—1 Bing. N. S. 633; 10 M. & W. 397. I think that he does want an excuse, for having left it in the hands of the payee and nothing appearing to prevent the payee transferring it, he had ostensibly and *prima facie* that right; and the plaintiff acquired *prima facie* a good title and right of action against the maker by purchasing it and becoming the endorsee and holder thereof, except only that being overdue the defendant may set up the previous satisfaction as a defence, although the plaintiff gave value and had no notice. Such matter is the cause or excuse which the defendant relies on for not performing the implied contract and promise to the plaintiffs arising by intendment of law, upon the indorsement stated in the declaration and admitted in the plea. His excuse is, that being overdue and already satisfied, the indorsement was invalid and conferred no legal right. Surely this is not denying the indorsement or its *prima facie* effect, but excusing or justifying the breach of promise laid in the declaration, by matter *aliunde* which justified or excused it.

The case must be looked at as between these parties; and then what excuse would the defendant have if the note had not been both over due and previously satisfied? It is

true, a note overdue and paid is no longer transferable; and it may be said that the facts pleaded shew that this chose in action did not pass by the indorsement; wherefore the plea in the matter of it virtually denies the alleged transfer as well as its legal consequences, and is therefore in *denial*. No doubt the legal effect of the plea is, to invalidate the indorsement; but the plea is not therefore in denial, but in avoidance. The indorsement in *fact*, is not denied. While it subsists unanswered, it is a valid transfer of the chose in action and binding, and its legal effect only is evaded; and herein consists the distinction between pleas in denial and in excuse, &c.

Had all that the plea alleges occurred before the note became due, it would not be even a good excuse; but would the plea under such circumstances be in excuse or denial? I think it would be clearly in *excuse*, but no bar; and if a plea (wanting the averment of the indorsement after due) would be in excuse, I do not see why that averment being introduced (and without which the plea would be bad) can alter its character to a plea in denial.

The only difference is, that an indorsement after due is exposed to be avoided by circumstances that would be insufficient if made before maturity. If indorsed before due, with notice or want of consideration, the facts pleaded with an averment of notice or without consideration, would be equally a good defence in law; and still the plea would, I apprehend, be in excuse—not denial—admitting a breach of the *prima facie* contract or promise, but shewing it to be in law excused.

It is not a plea of denial in fact—only in law; it is a plea, which admitting the plaintiffs to have a colour of action, alleges new matter which forms the subject of allegation and proof on the part of the defendant, in other words, matter of defence, in answer to the plaintiffs' *prima facie* right of action.—See Bing. N. S. 633; 10 M. & W. 397-8.—Which defence, though it denies a right of action in law, concedes on the face of it, a *prima facie* right, including a confession of the breach of contract or promise laid in the declaration, but excusing it by reason of the defendants

non-liability in point of law. The cases that seem to me applicable are—Isaac v. Farrar, 1 M. & W. 65; Parker v. Riley, 3 M. & W. 230; Jones v. Senior, 4 M. & W. 123; Basan v. Arnold, 6 M. & W. 559; Humphries v. O'Neill, 7 M. & W. 371; Purchell v. Salter, 1 Q. B. 197; Salter v. Purchell, 1 Q. B. 209; Morley v. Culverwell, 7 M. & W. 174; Whitehead v. Walker, 9 M. & W. 506; Scott v. Chappellow, 5 M. & G. 336; Cowper v. Garbett, 13 M. & W. 33; Herbert v. Sayer, 5 Q. B. 965, 2 D. & L. 49; Gibbons v. Motham, 6 M. & G. 692; Hartley v. Manton, 5 Q. B. 247; Bennett v. Bull, 11 Jurist, 1067; Tolhurst v. Notley, 12 Jurist, 43; Mitchell v. Cragg, 10 M. & W. 367; 2 Dow. N. S. 252.

McLEAN, J.—The defendant does not deny the making of the note, or its being endorsed by the payee to the defendant, but he says *he* has paid it before the indorsement and after it became due.

The defendant, by the note, undertook and promised to pay D. G. Miller or his order; and when the order to pay to the plaintiffs was endorsed on the note, then the promise was to pay to the plaintiffs. An implied, if not an actual promise to pay the plaintiffs, immediately arose on the note when it was indorsed. The plaintiffs have correctly stated it as a promise to pay them, and allege a breach of that promise and damage in consequence. How does the defendant get rid of that implied promise? By shewing that before the plaintiffs became entitled as indorsees, and after the note became due, he had paid the amount to the payee; he was bound by his contract to pay the note to Miller *or* to his indorsees. *Prima facie*, the indorsees had a right to claim a fulfilment of his promise *to them* as the *holders* of the note; but the defendant could say, as he has said, that he has paid it to the payee, from whom they got it, after it became due; and therefore he is excused in law from paying it to them. All this appears to me to be matter of excuse only for not paying the plaintiffs.

They took the note from the holder, and from its being outstanding in the hands of the payee, had a right to suppose that it remained unpaid; by the indorsement the

note was transferred, and with the promise to pay it; at all events, a promise would be implied in law; that promise is binding on the maker, unless he can shew some good excuse for not performing it. By proving payment to the payee, he will excuse or absolve himself from the promise which arises on the face of the instrument, and from the indorsement, to pay to the indorsees.

I cannot distinguish this case, in principle from the cases of Isaac v. Farrar, 1 M. & W. 65; Nole v. Rich. 2 C. M. & R. 360; Herbert v. Sayer, 2 D. & L. 49; Mitchell v. Cragg (per Parke, B.), 10 M. & W. 367; Richards v. Macey, 14 M. & W. 484—all of which seem to me to establish, that where the action is on a bill, not between the immediate parties to it, and satisfaction to an intermediate holder is stated in the plea, with an averment that it was indorsed after due, or with notice to the plaintiff—*de injuria* is a good replication; and the obvious reason is, that in such case the subsequent indorsement of the bill or note to the plaintiff, raises an implied promise, a breach of which is excused by the prior facts.

I can imagine the holder of a note, by indorsement, demanding payment from the maker, saying to him, "you made your note to A.B. and promised to pay it to his order; now I hold it under his order, endorsed on the note, and am entitled to have your promise fulfilled." The maker could only say, "true, I made such a promise as you state; but then I performed it, by paying to A. B. after it became due, and he accepted payment in full, before he transferred my promise to you, so that I am excused in law from paying you."

In the case of Schild v. Kilpin, 8 M. & W. 673—the action being by the indorsee of a promissory note—the maker pleaded, that after the indorsement of the bill to plaintiff, and before the commencement of the suit, the plaintiff, for a good consideration, had indorsed the bill to J. W., who, from that time, continued and was the holder of the bill, and that he, defendant, was liable to J. W. as the endorsee and holder of the bill. The bill replied *de injuria* to that plea, and the replication being demurred to as inapplicable, it

was held that the plea was in denial, not in excuse of the breach alleged in the declaration, viz., the non-payment of the bill according to the tenor and effect of the acceptance, and that the replication was therefore improper. That case does not appear to me to clash with, or affect the principle of the other cases to which I have referred. The plea was as to matter between the plaintiff and defendant in the suit, and the defendant shewed that the contract and the promise were transferred and available to a third party. The name of this plaintiff, as endorser, might in fact be struck out, and the holder might then sue as having received the bill from the prior indorser; so that Schild, the plaintiff, while liable himself as indorser, to the holder at the time the action was brought, had no *prima facie* right to sue the maker.

In the case of *Isaac v. Farrar*, which, like this, was an action of assumpsit by endorsee against maker, the plea was that the note was obtained by fraud, to which the plaintiff and his endorser were privy, and that the indorsement to the plaintiff was without value. Replication *de injuria*, demurred to specially, was held good, as the plea amounted only to matter of excuse for the non-payment of the promise.

Now fraud in obtaining a note, would as effectually destroy it and extinguish all right upon it by a party to the fraud, or an endorsee holding from him without value, as payment to the payee. But as the promise could not be denied, the defendant was obliged to shew a sufficient excuse for not performing it. The plea of fraud, to which the plaintiff was a party in obtaining the note, ought to be as good a bar to the plaintiff's action as the plea of payment to the payee, yet in the former case, that plea was not considered as anything more than an excuse for not performing the promise to pay the indorsee in compliance with the contract, appearing on the face of the instrument.

My opinion, formed with a good deal of hesitation, after hearing the difference of opinion between my learned brothers, who have each advanced strong arguments in favour of their respective views, is, that the replication in this case is good, and judgment must be for the plaintiffs on the demurrer.

SULLIVAN, J.—The question intended to be raised by this demurrer is, whether it is competent to a plaintiff to traverse, by a general replication of "*de injuria*" a plea of payment or satisfaction, by the maker of a promissory note to the payee, after the note became due, in an action by the indorsee against the maker.

The replication *de injuria*, in terms, re-asserts the promise and breach of promise, as stated in the declaration; it denies an excuse or cause pleaded for the breach of the promise. It is only when such an excuse or cause is pleaded that the replication is at all applicable, or has any meaning.

Therefore, in an action by the payee of a promissory note against the maker, when the latter pleads payment, at the day or before it, and thus denies the breach stated in the declaration, the replication *de injuria* would not have any meaning, for no excuse is offered by the plea, and the replication puts nothing in issue. In like manner when, in an action between the original parties, payment or satisfaction after the day is pleaded, the replication *de injuria* has no meaning, for the plea alleges no cause or excuse for the breach of promise, but, on the contrary, admits a breach without cause or excuse; and therefore a replication stating that the defendant broke his promise without cause or excuse, is only a reiteration of what the defendant has already admitted, and puts no matter in issue.

This, however, does not prove that a promissory note is to all intents and purposes extinguished by payment or satisfaction, while yet it is suffered to remain outstanding; and that it is not so extinguished is evident, because if indorsed to a *bona fide* holder before the day appointed for the payment, it is a good chose in action in his hands, notwithstanding any payment before that day. It is true that notice of the previous payment to the indorsee, before the indorsement, would incapacitate him from suing; but still it would be no extinguishment of the chose in action, which would still be capable of being transferred to, and of being made available by any indorser, without such notice.

The notice, therefore, only includes an incapacity to use

what is nevertheless a subsisting chose in action; in other words, the previous payment and notice form an excuse for the maker not paying to the indorsee. When a note is indorsed over after the day of payment, the indorsee and all subsequent holders are bound to take notice of all relations existing previously between the original parties; they are supposed in law to have notice of these relations, and if the note were paid at the day, or discharged after the day, and nevertheless indorsed, the holder would be incapacitated from recovering on the note, and the proved payment and presumed notice would, together, form an excuse for not complying with the *prima facie* legal obligation which always subsists on the part of the maker to pay an outstanding promissory note.

A declaration, to be good, must state, expressly or impliedly, all that is necessary to the plaintiff's recovery; and yet some things, absolutely necessary to the plaintiff's right of action, are inferred, or taken as if stated, and a denial of them is a traverse of the declaration; though strictly, or rather literally speaking, the affirmative of the proposition denied is not found in words in the declaration. For instance, in the declaration in trespass, "*quare clausum fregit*," the plaintiff does not allege possession of the chose, he asserts that it is his chose, and he is inferred to assert the possession. The defendant denies the possession, and this is considered a plea in denial, a traverse of the declaration, and thereupon issue is joined.

In like manner, in the declaration on a promissory note, made by the statute of Anne an assignable chose in action, the plaintiff does not in words say that he is the holder of the note at the time of action brought, but he is taken to assert that fact, and any plea that denies his being the holder in fact, of the note at the time of the action brought, is a plea in denial.

The declaration states the making of the note and its indorsement to the plaintiff in words, and the fact of the plaintiff's being the holder by inference; and these facts together form a *prima facie* claim on the part of the plaintiff to be paid the amount of the note, from which the promise stated on the declaration is a legal inference.

This promise is not the original promise to pay the plaintiff or order, for in many cases it arises after that original promise becomes impossible to be performed. It is a promise arising from the indorsement and by virtue of the statute, and it arises *prima facie* in all cases where an outstanding promissory note is transferred.

It is not a denial of the promise stated in the declaration of an indorsee against the maker of a promissory note, to say that it was paid to the payee before or at or after the day of payment mentioned in the note. For the promise stated in the declaration arose from the promissory note indorsed and remaining in the hands of the assignee, who has not found it necessary, either expressly or impliedly, to state in his declaration that it remained due, and that it was not paid to the original payee. He has found it necessary to allege that it was not paid to himself, for that is the breach upon which the action is founded. But the plea of payment to the original holder is no denial of that breach, any more than it is a denial of the promise; and being no denial of either the promise or the breach, it is not in denial of the cause of action stated, neither is it a plea of satisfaction, or discharge of that promise, or cause of action; and thus, being neither in denial or discharge, it is and must be in confession and avoidance, admitting the promise and shewing a cause why it should not be performed. This cause is traversed, as it appears to me, with all strictness and logical propriety, by the plea of "*de injuria sua propria absque tali causa.*"

A desire to avoid unnecessary prolixity in the reports of this court has induced me to lay aside a long review of all the cases to be found on this subject, the perusal of which led me to a conclusion upon which I cannot say that I entertain any doubt, beyond what I must necessarily feel in opposing my opinion to that of the Chief Justice. All these cases have been quoted by my brother Macaulay, in whose judgment I fully concur. The little that I shall further say will consist principally of a statement of the doctrine upon which my opinion is founded, in the words of the learned judge who delivered it, and of a few remarks upon

the cases which might on a first perusal appear to bear to a contrary conclusion from my own.

In the case of *Noel v. Rich*, 2 C. M. & R. 369 ; 5 Tyr. 932, s. e., Lord Abinger thus expresses himself: "Now if a man puts his name to a bill of exchange, that is *prima facie* a promise, as it is a transferrable security to pay the *holder*, resulting as a matter of law from the nature of the instrument. All the cases, therefore, except when the promise is denied by denying the hand-wrighting, are properly matter of excuse for the non-performance of the contract."

If his lordship had added to his exception the further exceptions which the case before him did not call to his mind—namely, except where the breach of promise is denied by an allegation of payment to the plaintiff, or of satisfaction after breach to the plaintiff himself—his statement of the law would have been nearly complete. These could not be excuses or causes for the non-performance of a promise, the one asserting the performance, the other admitting the breach without cause or excuse ; and it is not because these self-evident exceptions did not occur to him, or because others perhaps equally as plain may be pointed out, that I am able to reject the doctrine he comprehensively lays down in the present case, to which I think it clearly applicable.

As to the cases which may appear opposed to my opinion, the first is *Parker v. Riley*, 3 M. & W. 230. The action was not upon a bill or note, but for work and labor by the plaintiff as an attorney. The plea alleged that the work and labor was done by a third person, who was not an attorney, in the name of the plaintiff, who was one ; *de injuria* was replied, and Baron Parke said of the plea—"It either amounts to the general issue, or is in avoidance of the the contract itself : on the first supposition, the replication is clearly bad ; on the second, we are strongly inclined to think so."

In this case the instrument was wanting from the nature of which a promise would arise. The promise stated in the declaration arose from the fact which was denied, namely, that the work and labour was not that of the plain-

tiff but of another ; or in the other view, that it was for work and labour in fraud of the law, from which no promise could be inferred. In either case the plea was a denial, not a cause for non-performance of a promise, and therefore a replication which put a cause for non-performance in issue, might well be said not to be good.

The case of *Solly v. Neish*, 2 C. M. & R. 355, was an action for money had and received. The plea amounted to an allegation that the money was received for goods which belonged to the plaintiff and another. The replication *de injuria* was held bad, for the plea was merely in denial of the promise to pay the plaintiff, or of the facts from which that promise was to be inferred, and the replication *de injuria* was clearly inapplicable.

In the case of *Jones v. Senior*, 4 M. & W. 123, the substantial part of the plea was, satisfaction to the plaintiff himself after breach, to which it was held that *de injuria* could not properly be replied.

Cleworth v. Pickford et al., 7 M. & W. 314, was an action not on a bill or note, but for work and labour as the master of a barge ; the plea was that the plaintiff agreed to be accountable for pilferage (which it alleged) out of his wages. It was held that *de injuria* was not a good replication, for this plea was a denial of the contract stated in the declaration.

Schild v. Kilpin, 8 M. & W. 673, was an action by the indorsee against the acceptor of a bill of exchange ; the declaration was in the form given by the new rule, *i. e.*, "the defendant was stated to promise the plaintiff to pay the bill according to the tenor and effect thereof." The plea alleged that after the endorsement to the plaintiff, and before the commencement of the action, he indorsed the bill to one J. Wright, who still was the holder. The replication *de injuria* was held bad ; Baron Alderson saying that the promise to pay the bill according to its tenor and effect, was a promise to pay the holder ; for it avers that the bill was indorsed to him ; the plea admits this, but adds, that it was indorsed afterwards to Wright. If the breach, says Baron Alderson, be that the bill was not paid to plaintiff, the plea

amounts to a denial that such non-payment is a breach of the promise of the defendant. Instead, therefore, of being an excuse of the breach, it is a denial of the breach—an argumentative one perhaps, but that would only make it bad on special demurrer, and consequently *de injuria* is not a good replication.

This decision appears to me to be a sound one, though the reasons given are not the most simple and direct. The declaration in that case would have been equally good, if the promise stated had been to pay the plaintiff the bill, instead of to pay the bill, and then the reasoning of the learned judge would not apply.

If the promise arising upon a note or bill be to pay the holder, every declaration on a note or bill must be held to include the allegation that the plaintiff is the holder at the time of action brought; a plea shewing him not to be the holder, is, therefore, a direct denial of an averment necessarily implied in the declaration, which declaration is good only, because the status of the bill upon the indorsement is presumed to be alleged to continue until action brought. Every plaintiff in an action on a bill or note, must be held to allege "I am the lawful holder;" a plea in denial of this fact is not an excuse, but in denial of plaintiff's right, and the replication *de injuria* clearly inadmissible, without shewing, in the least, that the same replication is bad in the case now before us.

Eyre v. Savill, Jurist, April 8, 1848, shews that matters may be impliedly alleged in pleading, though not expressly, and being so alleged they may be traversed; see, also, 1 W. Saund, 312; 2 W. Saund. 10; 6 M. & W. 607; 4 W. & G. 427.

The case of Purchell v. Salter, 12 B. 178, reversed in the Exchequer Chamber as reported in the same volume, 209, would appear at first sight to be an authority against this replication: it was an action of debt for goods sold; the defence pleaded was, that the plaintiff gave authority to an agent to sell the goods as the agent's own, that the defendant bought them as the goods of the agent, who then owed the defendant a debt which he offered by his plea to

set off against the claim of the plaintiff. The replication was *de injuria*, which was, by the judgment of the court above, declared to be bad. The case appears to me to be rightly decided, but not to be at all applicable to the present case. The plaintiff was not the assignee of a chose in action, as in the case of an indorsed note or bill; he was placed by the circumstances and the law, as to the set off as if he were the party owing the sum desired to be set off, on the same principle that a payment to the agent would be the same as a payment to the plaintiff; a set off due by the agent was a set off due by him, the plaintiff; and a set off due by himself, if pleaded, could not be replied to by *de injuria*, for a set off is not pleaded in excuse, it is in compensation under a statute, it depending on the election of the defendant up to the time of the plea pleaded whether it will be so used; a payment to the agent could not be replied to by *de injuria* any more than the set off; neither the payment or the set off is an excuse for not performing a new promise to the plaintiff, but the one is in discharge and the other in compensation of a debt originally due to the plaintiff, the non-payment of which is in either case sought by the plea to be excused. The case is therefore essentially different from any case of an action brought on a bill or note when, from the assignable nature of the instrument, a *prima facie* cause of action exists to the holder, by the mere fact of the assignment.

The cases, the careful perusal of which, together with long and anxious deliberation with my brothers, have led me to the conclusion that the replication *de injuria* is good in the present case, are—Crisp v. Griffith, 2 C. M. & R. 159; Isaac v. Farrar, 1 M. & W. 65; Watson v. Wilkes, 6 Ad. & E. 237; Faith v. McIntyre, 7 C. & P. 44; Noel v. Rich, 2 C. M. & R. 360, 5 Tyr. 632; Griffin v. Yates, 4 D. P. C. 647; Reynolds v. Blackburn, 6 D. P. C. 19, 7 A. & E. 161; Basan v. Arnold, 6 M. & W. 559; Cleworth v. Peckford et al., 6 M. & N. 314; Humphrey v. O'Connell, 7 M. & N. 320; Whitehead et al. v. Walker, 9 M. & W. 507; Mitchell v. Craig, 10 M. & W. 367; Cowper v. Garbett, 13 M. & W. 33; Gibbins v. Mortimer, 6 M. & G. 692; Her-

bert v. Sayer, 2 D. & L. 49 ; Washburn v. Burrows, 15 L. J. 267 ; Tolhurst v. Notley, Jurist, January, 1848 ; Bennett v. Bull, 11 Jurist, 1067.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Judgment for the plaintiff on demurrer.

ROBINSON, C. J.. dissentiente.

McNAB V. ADAMSON.

The right which a party has acquired by twenty years' uninterrupted user to pen back the water of a stream in certain quantities, for the purposes of his mill—will be strictly confined to the right as *actually exercised* ; and any subsequent *excess* beyond the twenty years' enjoyment of such right, if injurious to others, will render the party liable to an action.

The description of injury complained of in the declaration by the erection of the mill-dam, must be substantially proved as laid in some one of its courts.

Case for overflowing plaintiff's land.

The declaration contained several counts:—1st, stating that plaintiff was lawfully possessed of the east half of lot No. 12, 11th concession of Esquesing, across and from which the River Credit flows, to and across No. 11 in said 11th concession, and of right ought to flow through the plaintiff's close without interruption ; that defendant wrongfully built a dam and maintained it across the river, on No. 11, whereby the water was dammed back and flooded the plaintiff's close, &c.

2nd count, for wrongfully continuing a dam wrongfully erected by one James McNab, whereby, &c.

3rd count—after stating plaintiff's possession, &c.—that one James McNab, on 1st of May, 1825, had built a dam on No. 11, across the stream, of a certain height, to wit, two feet ; and that the water of the stream of right should have flowed uninterrupted excepting by this dam ; yet the defendant wrongfully raised the height of this dam beyond the height at which it had been built, by means whereof the water was caused to flow over the usual natural banks and water-marks of the stream in and over the plaintiff's close, whereby, &c.

Pleas.—1st. General issue to the whole declaration.

2nd. To all the counts, that plaintiff, by reason of his possession, was not entitled to have water of the river flow *modo et forma*.

3rd. To first and second counts, a prescriptive right, by twenty years' user before action brought.

Issues were joined on the first and second pleas, and a traverse of the right pleaded on the third, on which issue was also joined.

At the trial it appeared that the plaintiff's lot was on the River Credit, and that in 1823 James McNab occupied, as owner, the lot now in defendant's possession, and built a saw-mill, and in 1825 a grist-mill thereon. He raised the water at first by building a wing from the bank on the side where the mills were, in a slanting direction up the stream and then crossing it, but not quite to the opposite bank. By this wing the water was turned into a race-way dug on the land, leading the water to the mills. As this did not supply sufficient water, in 1825 he placed a log or pier of timber at the upper end of the wing across to the opposite bank, and further to check the water, but in hemlock boughs &c., so as (leakage excepted) to turn the whole current down towards the race. These erections, though frequently damaged or partially carried off by floods, were renewed. Since the defendant came into possession (last summer) he had raised the wing higher and built it of stone, and he had put a dam of hewn timber, where this log and hemlock brush were placed. The plaintiff gave defendant notice in writing, dated 6th May, 1847, not to raise the dam.

The plaintiff gave strong evidence to shew that by what the defendant thus did—which was in the spring or summer of 1847—the water was raised *at least* a foot, and he proved several statements of defendant supporting that conclusion, and gave particular proof of damage to some hay cut while the land was dry, while defendant's people were working at the dam. When they had finished, the water was raised to the depth of near a foot where this hay was cut.

A good deal of evidence was given, from which it appeared that for many years the land of the plaintiff had been suffering progressive injury—connecting long before

the defendant made any alteration in the dam—as if it were becoming more and more saturated with water, from the soft and porous quality of the soil.

The defendant called witnesses to prove that he had not done anything to raise the level of the dam, only of the wing; and that, except so far as tightening and stopping leakage went, the water could escape just as much as before the finishing of the works last summer.

The jury were directed that there was sufficient evidence to establish the plea of prescription to the first and second counts. As to the third, they were told to say whether the plaintiff had proved to their satisfaction, that this land was overflowed in consequence of defendant's having raised his dam last summer—that the enquiry should be, was the dam raised above the height, at which it was put up more than twenty years ago; and if so, was the plaintiff's land overflowed thereby to his damage?—the only damage complained of, being charged to arise from overflowing.

The jury found for the defendant on the plea of prescriptive right to the first and second counts, and for the plaintiff on the third count, with 7*l.* 10*s.* damages.

Cameron, Q. C., moved for a new trial, on the law and evidence and the judge's charge. *Freeman*, of Hamilton, shewed cause. The case turned wholly on the evidence as to an alleged excess in the enjoyment of a previously acquired right, and as to whether the injury, as laid in the declaration, had been proved. No authorities were cited on either side.

ROBINSON, C. J., delivered the judgment of the court.

The parties occupy respective lands on the same stream, in the township of Toronto, McNab's land being above that of Adamson's. The damming up the water by Adamson being the first interference with the natural flow of the water, I will consider whether McNab was shewn to have suffered from that, any injury to which he had a legal claim to compensation.

It seems to be clearly made out by the evidence that whatever right the defendant had, by an uninterrupted user for 20 years to pen back the water for the purpose of his

mill, he had exceeded any previous enjoyment of that right, by putting up so lately as last year, additional erections in and across the stream, which have the effect of obstructing the flow of water. So far, there is no room for doubt on the evidence, and the question remaining is, whether these additional works had had the effect of occasioning, to the plaintiff, such an injury as is complained of in either of the counts of the declaration. It is seldom possible to say, after a trial of any such actions, that the evidence respecting the injury alleged to be occasioned by the obstruction, has not been contradictory.

It is the common experience of such trials, to find some witnesses brought forward who will swear distinctly that they have taken levels and made such observations as convinced them that, beyond doubt, the dam cannot possibly have had the effect ascribed to it, while other witnesses can be produced to swear on the other side, that they are equally certain that that has actually happened which has been proved to be impossible, and it is between these conflicting statements, that the jury very often have to judge. The evidence given in the case before us, though it does not all tend one way, and is not entirely free from contradiction, yet does, I think, preponderate in support of the assertion, that the plaintiff has suffered the injury complained of, in consequence of the alterations which the defendant has lately made.

Knowing no more of the facts of the case than the judge's notes disclose, I think the verdict was consistent with the weight of evidence, not opposed to it; and certainly if the plaintiff was shewn to have sustained any considerable damage, the amount of the verdict was not unreasonable.

It is objected that the injury proved was not precisely such as the declaration describes, for the water was not shewn to have been forced over the banks of the stream upon the plaintiff's land, but that the wrong, if there was any, consisted in its being raised higher in the bed of the stream, and its oozing through the soil on the side of the stream, and thus finding its way open, or rather into the plaintiff's land.

No doubt, in such actions, the manner by which the injury has been occasioned must be correctly described, in order that the defendant may know what is complained of, and may shape his defence accordingly. But we cannot say that the evidence supports the exception, for although by one or two of the witnesses it is stated that the water does not overflow the bank, but runs through the soil near the top, and so finds its way on the plaintiff's land, yet other witnesses speak of the injury differently, and it was expressly left to the jury to keep the distinction in view, and give their verdict according as they should thus find the declaration supported or otherwise; besides in the 3rd count the injury seems to be correctly described to suit the defendant's view of it; for that count avers that "by reason of the dam being built upon, raised and increased in height, the water was dammed and penned back and caused to flow over the usual banks and *watermarks* of the said stream, *in and over the plaintiff's close.*"

If it was forced over the usual *watermarks* of the stream, *in and over the plaintiff's land*, that would form a complete statement of a grievance as set forth in that count, though the plaintiff might be held to have failed in proving that the water ran over *the top of the bank*; for neither in regard to a count of an indictment or a declaration is a party bound to prove all that is complained of as a wrong; it is sufficient if he proves so much of it as completes the wrong or injury, if it stood alone.

Per Cur.—Rule discharged.

BROOKE v. McCAUSLAND.

To an action by the indorsee against the maker of a note payable to bearer, the defendant pleaded payment or satisfaction to the payee *before* the note became due, and that it was transferred to the plaintiff *after* such payment, without any consideration from the plaintiff to the indorser, and that the plaintiffs held the same without having given consideration therefor. Replication, *de injuria*. Demurrer.—*Held, per Cur.*—Replication of *de injuria* good. (See preceeding case of Muttlebury v. Hornby.)

ROBINSON, C. J., *dissentiente*.

The plaintiff sued the defendant as maker of a promissory note for 15*l.* 18*s.* 10*d.*, payable to Beatty or bearer, made on

25th of May, 1842, and payable six years after date, and endorsed by Beatty to the plaintiff.

The defendant pleaded that, before the note became due, and before it was endorsed, viz., on the 1st of Jan'y, 1848, he paid to Beatty the full amount of the note, and that the note was transferred and delivered to the plaintiff after such payment, without any consideration whatever from the plaintiff to the said Beatty, and that the plaintiff holds the same, without having given any consideration whatever therefor.

Replication *de injuria* and demurrer.

Phillpotts for the demurrer. *Duggan* contra.

The authorities cited were 13 M. & W. 651; 3 Dow. 453; 2 C. M. & R. 360; 5 Tyr. 632; 10 M. & W. 369; 2 D. & R. 49; 5 Q. B. R. 965; 6 M. & G. 692; 2 Dowl. N. S. 78; 5 A. & E. 227; 2 Bing. N. C. 579; 7 A. & E. 161; 6 M. & W. 559; 8 M. & W. 673; 2 D. & Low. 981.

ROBINSON, C. J.—The peculiarity of this case, which distinguishes it from the case of *Muttlebury et al. v. Hornby et al.*, in which we have just given judgment, is, that this note was paid before maturity, and, for all that appears, endorsed to the plaintiff also before maturity, though after it was paid.

Upon the argument, it seemed to me that this was a case in which the replication *de injuria* would be proper; but afterwards, upon consideration and references to the cases, I came to a different conclusion, though not without doubt; and as my brothers, I find, think the replication sustainable, I am the less confident.

In support of the demurrer, it is to be considered that payment before the day, is in effect payment at the day, and may be so pleaded in an action, after the day of payment has arrived; so that if Beatty had kept the note after he had been paid in full, and after the day arrived had sued the defendant as maker, in order to compel him to pay it a second time, the defendant could have pleaded payment in the common form, and the fact would have supported the plea.

This shews that, so far as any liability to the payee is

concerned and any remedy by him, the cause of action was satisfied and extinguished, as much as if it had been paid in common course at maturity, instead of before.

Then the principle is, that whenever the payee of a note has been satisfied by the maker, or is on any other ground disabled from recovering on the note, no one who takes it from him, can stand on better ground than himself, unless he took the note without knowledge of the fact, or took it before it was over due and paid a valuable consideration for it. And in this case the plea states that the plaintiff gave no consideration for it; and from thence it may be urged that the same plea which would shew it satisfied and discharged, *quoad* the holder, must shew it equally discharged as to him, and that no liability followed the transfer and delivery; and without resorting to anything beside it, except what is matter of discharge.

On the other hand and in favor of the replication, it may be said, that when the defendant made the note, he promised by it, to pay to Beatty, or any person who should become the bearer of it, that is, any person to whom he should transfer it, 15*l.* 18*s.*, on the 25th May, 1848. The plaintiff then, after the 25th May, 1848, comes and says that he became the bearer of this note (on the 25th May, 1848, as I interpret the declaration); and it was to him therefore that the note should have been paid on 25th May, 1848, and he claims performance of that promise, which no one but himself was ever in a situation to claim according to the contract. The defendant does not deny his promise, neither does he say that he performed it; he stands, therefore, *prima facie* liable; and excuses himself from performance, by alleging that he had paid the note to Beatty before it was due, who, *after* it had been paid, but before it came to maturity, transferred it to the plaintiff. So far, there is neither denial of the contract shewn nor performance, nor anything that the law recognizes as an excuse for non-performance; for it is quite clear, that if the maker of a note will, out of the ordinary course, pay his note before it is due, and still leave his note current and apparently undischarged in the hands of the payee, he must pay it again to

any one who takes it ignorantly and for value, while it is current. What excuse, then, has the maker for not paying the plaintiff?—this excuse, that the plaintiff gave nothing for the note, and therefore cannot compel payment a second time; because he can stand upon no better ground than the payee, having given no value.

Is that then properly to be looked on as *excuse*? and so admitting of the general traverse by *de injuria*? Or is it more correct to say, that although the giving no value is, under some circumstances, and with a view to some defences, only matter of excuse, and though it is generally nothing more, yet that, when pleaded as here with matter in discharge, and pleaded in order to shew that the discharge is binding on the plaintiff as well as on the payee, it is part of the matter in discharge of the action (See *Jones v. Senior*, 6 Dowl. 702), and so requires to be specially traversed; or that, at all events, it cannot entitle the plaintiff to traverse otherwise than specially that matter of discharge, which the whole statement in the plea makes as binding on the plaintiff as it was on the person from whom he took the note. *Herbert v. Sayer*, 5 A. & E. N. S. 965, is in some respects like this case, but in others very distinguishable from it. So far as it bears on the case it is in favor of this replication; and the question is, whether it resembles it enough in its facts to make it applicable as an authority. If it does, I shall be glad to avail myself of it—to solve by its help a point that seems on principle doubtful.—7 M. & W. 504. But the difference in that case is, that the facts pleaded did not amount to a discharge of the defendant—they only shewed a willingness or offer in a third party, to have paid up in full another note in the hands of the payee of the note sued on, and to secure which other note, the one sued on was made and deposited with the payee as a security.

The facts pleaded shew not even a discharge of the first note; and if they had, they would then only have shewn that this defendant was held liable on the note sued on, contrary to good faith and against an understanding collateral to the note—they would not have shewn that the defendant

had given any satisfaction to any one; and the defence clearly rested on an alleged fraudulent conspiracy to defraud the defendant, which has always been held to be matter of excuse for not paying, but not matter of denial, and it certainly is not matter of discharge.

On the whole, I think the cases which I have cited and stated more at length in the case of *Muttlebury et al. v. Hornby et al.*, establish these positions—that when the plea, not resting upon any allegation of fraud or imposition, or illegality, or bad faith, or any collateral understanding or agreement, but admitting the original contract and its validity, sets up matter of satisfaction or discharge, or shews that the plaintiff never had a cause of action, the plaintiff cannot reply in the general form, but must single out and traverse some material allegation in the plea.

Secondly: That this exception to the use of the replication prevails, when the defence pleaded consists in part of matter of discharge or denial or destruction of plaintiff's cause of action, though there may be other parts of the statement in the plea, which are in themselves in the nature of excuse or justification; to which therefore, if they stood alone, the plaintiff might have replied *ad injuria*.—4 M. & W. 123.

And to apply these principles to the case, I consider that payment of the note before the day when it became due, though it would be no defence against an endorser who took it for value, and without knowledge of the fact, while it was yet current, is yet a valid legal defence, as much as if the payment were in course, when it is pleaded with the averment that the plaintiffs obtained the note without giving value for it. The latter fact is only pleaded for the purpose of letting in the defence, which defence of itself, when shewn to be admissible, is matter of satisfaction and discharge, and cannot be answered in the general form.

But there is great room to doubt on the general current of authorities; and I am by no means confident that my view is the right one.

The cases which chiefly lead me to think the replication bad are—*Jones v. Senior*, 4 M. & W. 123; *Parker v. Riley*, 3 M. & W. 236; *Schild v. Kilpin*, 8 M. & W. 673; *Salter*

v. Purchell, 1 Q. B. R. 209; Jones v. Corbett & Insoll, 5 Q. B. R. 829; Whittaker et al. v. Mason, 2 Bing. N. C. 359.

MACAULAY, J.—In this case, the plea is payment to the payee before due, and the transfer of the note afterwards to the plaintiff, without consideration; as between the original parties this would be a plea of payment at the day, or of payment before the day, and a discharge of the promise before breach; unlike the last case, it would not be a plea in discharge of the breach after the promise broken, and in that light, not a plea of discharge; as between the original parties a plea of payment at the day would conclude to the contrary, shewing that it was in denial of the allegation of non-payment, which, being affirmed by the plaintiff and denied by the defendant, would form a perfect issue upon a material point, and shew, that in point of fact, the promise had not been broken as alleged.

A plea stating the facts specially, would shew a discharge of the promise or contract for adequate consideration before breach, and to such plea not being simply in denial, if not in effect, a plea of payment, I am not satisfied *de injuria* might not be replied; but whether or not, the present action is between the maker and a more remote party, who have a clear *prima facie* right of action by indorsement, (so far as the pleadings shew before the note became due), and the defence is a previous payment and a subsequent transfer without consideration.

It may be said, the defendant could not in special replication put in issue both allegations in the plea, viz., affirm consideration and deny the previous payment, both of which he may do if he can reply *de injuria* generally, but that is no sufficient test, the real test is, whether the plea is in confession and avoidance, and also in excuse, according to the limitation in Crogate's case. It may be said, that having already paid the payee and then holder, the defendant requires no excuse for not paying it over again to the plaintiff, who afterwards became the indorsee without consideration—10 M. & W. 367; 1 C. B. 215, 220—But it appears to me, that as he left outstanding a negociable chose in action transferable by endorsement, he does want an excuse, which

excuse consists in his having already paid a prior party, under whom the plaintiff holds without value. The matter of this plea does not deny the making or endorsing in fact, but admitting the facts as alleged, avoid their legal effect by collateral circumstances, which, if true, constitute a bar, and shew that the plaintiff never had any right of action against the defendant, by reason of the invalidity in law of the indorsement to render the defendant liable. (1 Bing. N. S. 633; 10 M. & W. 367.) It does not deny any fact alleged, or necessarily implied, and looking upon the plaintiff as the holder when it became due, it admits that the defendant did not then pay according to its tenor and effect, for the reason given; in other words, the cause or matter or excuse alleged. There is in this plea a more distinct admission of the breach alleged than in the last case, and, if my view in that case be correct, it of course governs the present.

With respect to the other grounds of demurrer, the replication does offer a material issue, being a traverse of all the material allegations contained in the plea, including a traverse of the alleged payment to Beatty; in the form of it the replication resembles closely the form of replication *de injuria* in debt, as given in the form of Chitty, jr.

In the case of Schild v. Kilpin, 8 M. & W. 673—indorsee v. acceptor, the declaration alleged that defendant promised to pay the plaintiff the bill when due, according to the tenor and effect thereof, and that he had not paid the said bill—which the court evidently considered equivalent to the allegation of non-payment to the plaintiff. In the present case the third count, after alleging the transfer of the note to the plaintiff, whereby he became and was the bearer thereof, and alleging that the defendant, therefore, became liable to pay the amount of the said note according to the tenor and effect thereof, and (after adding the fourth count) it concludes by alleging that the defendant had not paid any of the said moneys, or any part thereof, to the plaintiff's damages of £50. The case of Schild v. Kilpin shews that this is equivalent to alleging a liability to pay the plaintiff as holder, and non-payment to him as such. If so, then the

replication to the plea is, that the defendant of his own wrong, and without the cause by him in such plea alleged, neglected to pay the amount of the said note, &c. This means, neglected to pay the plaintiff as the alleged holder, which the plea admits and seeks to avoid. The operative words of the replication, as constituting a traverse of the plea, are, (without the cause by him therein alleged,) in other words, without the matter of excuse alleged, which matter is payment to Beatty, the payee, before the note became due, and its subsequent transfer to the plaintiff without consideration—11 East, 455; 1 Q. B. 214-5; 1 M. & W. 68, 364, 563; Tyr. Pl. 600, 6; 3 M. & W. 233; 5 A. & E. 237—The replication is not in strict conformity with the precedents, when used in actions of assumpsit, which this is—it is more like those adopted in actions of debt—1 Q. B. 203-4; 12 Jurist, 43—but still I consider it sufficient, so far as the grounds of special demurrer go. The 1st is, that the plea is pleaded in bar to the 3rd count, and not as a matter of confession and avoidance, and that the plaintiff has no right to reply *de injuria* thereto. This was disposed of in the first case, and I suppose it involved the main or only point relied upon.

The 2nd is, that the replication neither takes nor offers any material issue whatever on the 3rd plea; I have above expressed my opinion that it does.

The third is, that it is impossible to discover therefrom, whether the plaintiff intends to deny the payment to the said John Beatty, as stated in the plea, or to admit the same; I think it clearly does deny it.

The last is, that the plaintiff attempts to put in issue two separate and distinct statements in the plea, upon either of which he could have offered a good and material issue. That the replication does put in issue two separate matters, viz., the payment to Beatty as alleged, and the transfer to the plaintiff without consideration, is, I think, clear, for the effect of such a replication is to traverse all the material allegations in the plea, and nothing more, and both these allegations are material—Tyr. Pl. 652; Stephens' Pleading, 213; 1 Bing. N. S. 386-7; 3 Q. B. 768; 8 A. & E. 879;

10 Bing. 15; 2 M. & W. 789, 96, 349; 12 Jurist, 43, 269; 10 M. & W. 367; 2 Dow. N. S. 252, &c.

But if the plea, being matter of excuse, entitled the plaintiff to reply *de injuria*, it cannot be objected to, that it traverses two separate matters, when, as here, both are material and essential, together forming one ground of defence. On the subject of special denials, by way of replication, I would refer to *Bramah v. Roberts*, 1 Bing. N. & S. 469; 8 M. & W. 890-1; *Tyr. Pleading*, 590, 1, 3; 2 D. N. S. 43; 3 M. & S. 785—on the objection of duplicity to the replication *de injuria*, in this case, I have expressed my opinion already—*Tyr. Pleading*, 593, 600; 13 M. & W. 169, 70; *Tyr. Pleading*, 604; 2 B. & C. 908, (*De Wolf v. Bevan*, 3, M. G. 801, 5 (n. 4.))

McLEAN, J.—The plaintiff being the holder of the note, no matter whether before or after it became due, held an instrument by which the defendant promised to pay him as bearer, the money mentioned in it. He had a promise in his favour, and had *prima facie* a right to enforce it by action. He availed himself of that right, and brought his action for the breach of the promise. The defendant then comes into court to answer for the breach of promise complained of. He cannot deny the making of the note—he cannot deny that it contains a promise to pay a certain sum to the bearer, nor can he deny that the plaintiff is the bearer. But he says he has become the bearer without consideration, after the note was paid to the payee; and on that account he (defendant) is not liable or bound to pay the plaintiff.

It is unnecessary to go over the same ground as in the case of *Muttlebury et al. v. Hornby et al.*, in which the same question has been raised. In this case, as in that, I think the plea must only be considered as an excuse, for not performing a promise which appears on the face of the note, to pay the plaintiff as bearer the amount of it. The replication appears to me, under this view of the plea, to be good.

SULLIVAN, J.—The judgment pronounced in the case of *Muttlebury et al. v. Hornby et al.*, makes it unnecessary

for me to say more on the subject of replications *de injuria* in cases like the present, except that I see no material difference, whether the payment pleaded and replied to, was made before or after the note fell due—I think the replication *de injuria* good in both cases.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Judgment for the plaintiff on demurrer.

ROBINSON, C. J., *dissentiente*.

ADAMSON V. McNAB.

A., a riparian proprietor below the stream, pens the water back upon a proprietor B. above, so as to overflow, at certain seasons, B.'s land, upon which B. sues A. and recovers damages. B. then digs sluices close to the side of the stream which has the effect of diverting the water in large quantities (much greater than that penned back by A.'s dam,) from the natural bed of the stream, and past A.'s mill. A. sues B.—B. justifies the diversion of the water, contending that his sluices became necessary to remove the injury caused by A.'s dam, and his raising the water thereby; but *Held, per Cur.*, such justification no defence, under any state of pleading, certainly not under the general issue, which was the only plea in this case.

MACAULAY, J. *dissentiente*, who was of opinion, that a new trial should be granted for misdirection, on the ground, that the diversion of the water having been occasioned by the *combined act* of both the plaintiff and defendant, viz., by the dam of the plaintiff, and by the sluices of the defendant, not being merely a question of damage, but a good defence to the action, and admissible under the general issue, should have been left at the trial as a question of fact for the jury.

Case for diverting water from plaintiff's mill. The declaration contained five counts. 1st. Stating plaintiff's possession of a mill with the appurtenances, and his right, *by reason thereof*, to enjoy the benefit of the water of a stream to flow to the mill, and that defendant, on, &c., wrongfully dug, in the sides of the stream above the mill, divers trenches, &c., and thereby wrongfully diverted large quantities of the water away from the mill, and prevented the water of the stream from running along its usual course to the mill, as the same of right ought to have done, whereby, &c.

2nd count, stating plaintiff's possession of a mill near to a stream, which of right ought to flow into the mill sufficient for supplying the same with water; and that defendant wrongfully dug trenches so near the bank of the stream above the mill, that the water burst through the bank and

flowed into the trench, so that sufficient water for the mill did not flow to the mill.

3rd count, stating plaintiff's possession of a close near to a stream, which of right should run and flow in great abundance to plaintiff's close, and that defendant wrongfully diverted and turned large quantities of the water of said stream away from the close of plaintiff, and prevented the stream from flowing along its usual course to the close of the plaintiff.

4th count, not material, the issue raised thereon having been found for defendant.

5th count, stating plaintiff's possession of a mill near to a stream, which of right ought to flow in abundance to plaintiff's mill for supplying the same with water, and that defendant wrongfully widened and deepened certain sluices and water courses leading out of the stream, and thereby diverted a much larger quantity of water than had before used to flow out of the stream away from the mill, by reason whereof, &c.

Pleas—1st, not guilty.

2nd, to first count, that plaintiff by reason of the possession of the mill, of right ought not to have had and enjoyed the benefit of the water of the stream in that count mentioned, *modo et forma*.

3rd, to the second, third and last counts, that at the time, &c., the streams in those counts mentioned ought not to have flowed, nor had they been used to flow to the mills, close and premises of plaintiff, *modo et forma*.

4th, to first, second, third and last counts—*actio non accrevit infra sex annos*.

5th, demurred to.

6th, to fourth count, issue found for defendant.

Issue joined on the first four pleas.

At the trial the plaintiff proved his possession of the mill and of the land adjoining the defendant's, for about ten years or more, and gave evidence of the supply of water which before the defendant dug the ditch complained of, came to the mill. He gave evidence further, that within six years before the action was brought, the defendant and

persons in his employ dug the ditch complained of, not into the stream, but near the bank of it, and thence to a natural gully, which, passing through defendant's land in a circuitous direction, discharged the water again into the stream below plaintiff's mill dam, though at a place where defendant owned or claimed to own the land, passing, in fact, round the portion of land owned by plaintiff on that bank of the stream: that the soil of the bank, and also where the ditch was cut, was soft, and that in spring and fall, and during freshets, the stream overflowed its banks, and covered the flats on that side the stream, particularly where the ditch was cut, so that in a very short time a channel was worn through from the stream into the ditch, which kept constantly growing wider and deeper until about one-third of the whole water of the stream was diverted through this channel entirely from plaintiff's premises.

The plaintiff endeavoured to create the impression, by his evidence, that the defendant extended his ditch near to the edge of the bank in the expectation of the breach being made, which took place; if he did not actually dig it to the edge of the bank.

On the defence evidence was given, shewing that since the plaintiff had occupied these premises he had altered and raised the dam &c., by which the water was kept back and turned into a race-way leading out of the stream on the opposite bank to that where the ditch was cut, and so to the plaintiff's mill. That by means of this dam the water was permanently kept at a much higher level within its banks, in defendant's land, than it would have been if there had been no such obstruction, to do which it was contended the plaintiff shewed no right; that the water thus held back soaked through and injured defendant's land, and that he cut this ditch to drain his land and for no other purpose, and it was insisted, that this ditch being necessary to remove an injury caused by the plaintiff's dam, and the raising the water thereby, the plaintiff could not maintain an action, though he had sustained damages resulting from the digging of the ditch, as he was the first wrongdoer.

The jury were told to decide whether the plaintiff had

sustained injury by the cutting of the ditch by the defendant; that the plaintiff had given evidence, on the issue joined, as to the right to have the water flow, sufficient to entitle him to a verdict; that if they found the ditch was dug within six years, or if earlier, if they found the injury to the plaintiff from it to have commenced within six years, the plaintiff was entitled to succeed on the issue of the statute of limitations; and that if the defendant caused the injury complained of, though it may have been aggravated by the plaintiff's raising the level of the water within the banks of the stream—the defendant was liable, the latter consideration going only to the question of damages. They found for the plaintiff, 3*l*.

Freeman, of Hamilton, obtained a rule for a new trial on the law and evidence, and for misdirection. *Cameron*, Q. C., shewed cause. The authorities cited were 3 M. & W. 244; 12 Law Journal, N. S. 301, C. P.; 11 Jurist, 883; 6 C. & P. 529; 3 B. & Ad. 771; 3 Nev. & Man. 739; 1 A. & E. 493; 2 Roll's Abr. Nuisance, 1; 16 E. R. 215; 5 B & Ad. 827; Moo. & Mal. 365; 4 C. & P. 106; 5 C. & P. 426; 1 B. & Ad. 874; 3 U. C. R. 189.

ROBINSON, C. J.—I am of opinion that the trial in this case resulted properly in a verdict for the plaintiff. Leaving for the moment out of view any technical objections founded on the mode of stating the injury, or the particular issues raised by the pleadings, I consider that the plaintiff had a clear legal ground of action upon the facts proved by his witnesses. Occupying land on the banks of a stream he had a common law right to have the water of the stream flow past him in its natural course, without any part of it being diverted or diminished in quantity, or deteriorated in quality to his damage by any person living above him.

To entitle him to claim that right for any purpose to which it might suit him to apply it, there was no necessity that he should, before the wrongful act complained of, have made that particular use of the water in which he states himself to have been molested, either for twenty years, or for any length of time. If the plaintiff had come only a week before the injury, and put a mill upon the stream, he would have

as clear a right to enjoy the continued full flow of water, without diversion or obstruction, as if he had been using a mill there for twenty years.

If, indeed, the defendant, occupying land on the stream above him, had acquired a right by twenty years' continued enjoyment, to make any change in the natural flow of the water, that might have abridged the plaintiff's right, which otherwise is a natural right, depending upon no length of user for its foundation.

The injury, therefore, which the plaintiff in this case complains of, though it has been shewn to have been suffered by him only in regard to his mill, would give him a good claim to compensation, however recently his mill may have been erected. This right does not accrue to him by reason of his mill, but as owner of the land along which the stream ought to flow, though it is the injury to his mill which gives him his claim to damages.

Then what is the nature of the injury ?

There were ditches, it seems, dug by the defendant and his servants within a short period of this action being brought, which led a great part of the water of the stream out of its natural channel, through the defendant's land, into a ravine, along which it finds its way through the defendant's land into the river again, but not until it has got below the plaintiff's mill; so that the quantity of water which, before these ditches were dug, used to flow, and which of right should continue to flow, in the bed of the river, through the plaintiff's close, and past his mill, the plaintiff has been lately deprived of.

The defendant's alleged substantial reasons against being made liable for the injury, are two. 1st. He says he did not dig the ditches actually into and through the side of the stream, but only commenced them near the side of the stream: and though he admits that the ditches are now in fact open all the way, so as to admit the water directly running into them, yet he says that is because, from the porous nature of the soil, the river has gradually worn away the intervening earth; and that if he is liable in any respect for the consequences, it is only because he dug the ditches care-

lessly or unskilfully ; and that the action against him should have been special, for the consequential injury, as in *Dodd et al. v. Holme*, 3 Nev. & Mann. 739.

In the next place he denies that he is culpable at all, because he alleges that the defendant had wrongfully dammed up the stream to a greater extent lately than had before been done, thereby penning back the water, and causing it to flow over and through the bank of the stream upon the defendant's land ; and this, he contends gave him a right to do all that has been proved against him.

With respect to the first point, if it would have been more correct to have framed the declaration in the manner suggested, yet I do not find that an objection of that kind was taken at the trial, and unless it were, then, as the plaintiff could recover by another form of declaring, it would not be sufficient ground for setting aside the verdict, especially when the damages are so small. But the objection, at any rate, would only clearly lie to the mode of stating the injury in the first count, certainly not in respect to the third count, nor, I think, in respect to the second or fifth.

It may be truly charged that the defendant "diverted the water of the stream," as laid in the third count, for he dug ditches so near to it that in their natural effect, considering the porous nature of the soil, they have drawn water out of the river, which runs off by them, and away from the plaintiff's premises. This has clearly been the effect, whether the defendant intended it or not ; and there is ground in the evidence for the belief that such was his intention, for it is sworn, that on one occasion ; when a log that had floated down the river had accidentally closed the mouth of the ditch, so as to prevent the water of the river from running into it, the defendant removed the log in order to give it way ; and there were expressions proved to have been used by the defendant, in regard to the digging and widening of these ditches, which might well lead the jury to conclude that his desire and intention was to draw off the water from the river.

It is upon the second point, namely, the defendant's justification or excuse for making these ditches, that the

merits of the case principally turn. That was the point to which Mr. Freeman chiefly applied himself in arguing the case for the defendant.

I consider that the plaintiff's right to recover is free from any difficulty on that ground. I have looked carefully at the cases cited for the defendant, and see nothing in any of them that can fairly be taken to support the principle for which he contends. Following the case of *Mason v. Hill* through its several stages, as reported in 3 B. & Ad. 304; 5 B. & Ad. 1; 2 Nev. & Mann. 14; and referring to *Frankum v. Lord Falmouth*, 9 C. & P. 529; and to *Drewett v. Sheard*, 7 C. & P. 465; 4 Nev. & Mann. 330, and to the other cases bearing upon the question, I can see none which could warrant us in treating this verdict as illegal.

Admitting that the plaintiff, by erecting his dam, has penned the water back, and occasioned it to flow over the defendant's land, that would give a right to the defendant to prosecute him, as he has done, for the damage sustained, to say nothing of any right he might claim to enter and abate the nuisance. It would give the defendant no right to deal with the water of the stream as he pleases. It might justify the act of the defendant to a certain extent, but not to every extent. That would be setting up the *lex talionis* as the standard of right.

It has been argued, that the very fact that the defendant has recovered in an action against this plaintiff for the wrongful flooding of his land, by means of the plaintiff's dam, is of itself conclusive against the plaintiff's right to succeed in this action; but no such consequence reasonably follows; each is bound to do no unnecessary injury to the other, and each is liable to answer in damages if he transgress the rule. The two wrongs spoken of may bear no proportion to each other in their effects, and the one cannot, on any principle, (short of necessity) privilege the other.

In *Mason v. Hill*, 5 B. & Ad. 14, a similar defence was advanced; but the court met it by observing:—"The learned counsel for the defendant argued, that because the plaintiff pulled down the dam at the Sitchwell tree, in consequence of which the new dam was erected, he must be

considered as the author of the mischief, and has no right to complain of it. It is, however, quite impossible to maintain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it or brought an action. They had no right to construct another at a different place, and by means of it abstract more water than the other did."

It was found at the trial of this cause, that the ditches of which the plaintiff complains, actually carry off a very large portion of the water of the stream ; that they are wearing deeper and wider every year, and will soon lead off more of the water than will be left in the natural bed of the river. The fact of the plaintiff having wrongfully penned back the water, can never authorise the defendant thus to change its course. It can never justify him in doing so much more than is necessary for relieving himself from the inconvenience he complains of.

The cases of *Frankum v. Lord Falmouth*, and of *Drewett v. Sheard*, which I have already referred to, seem to come nearest to the present ; but they certainly afford no countenance to the defence set up here, the latter particularly shews to what extent and on what principle alone it can be thought reasonably to urge such a justification.

The defendant's counsel, on the argument of this rule, observed, that if this verdict can be supported, then it never can be safe for a proprietor of land to drain his fields into a neighbouring river. The answer to that is, that it may not be safe always to do so, without regard to consequences. *Sic utere tuo ut alienum non lædas*, is a maxim that we can seldom venture to lose sight of. If, instead of laying down a drain of stone, or brick or wood, well secured at the mouth, so as to answer only the purpose intended, of draining into a stream from land above, the owner of adjacent land should content himself with digging a mere ditch through loose earth, which will wear deeper and wider, so that at length, instead of draining into the river, it drains out of it, he can hardly regard himself as doing no wrong to those living below him on the stream.

If, indeed, the defendant could have convinced the jury that the plaintiff having wrongfully penned back the stream,

he, the defendant, had done nothing more than making a ditch, which had no greater effect than to carry off the water which arose above the natural bed of the stream, then his case would have stood on other ground, though, were it so, that act on his part might have admitted of a doubt which I need not discuss. But it is quite clear, on the evidence, that this is not what the defendant had done, and, in the nature of things, his act could not have had that limited effect. It was clearly proved on the trial, and is not denied, that in certain seasons of the year, and during freshets at all seasons, the river would naturally overflow its banks, in other words, would rise higher than the level at which the plaintiff's dam is capable of holding it back; for it is not pretended that the dam keeps up the water higher than the natural flow would at any time rise to. At all such seasons, then, of high water the plaintiff would have had more water for the use of his mill than he can now have at any time with the aid of his dam, for the ditches which the defendant has dug, must have the effect of keeping down the water to a level, above which it would at all times rise by the mere natural flow of the stream, if no such ditches were there.

It cannot be said that this would be no damage to the plaintiff's mill. Indeed as there can be no ordinary water line on the sides of a stream of this kind, but the level is perpetually fluctuating with the seasons, and is liable to be changed by every fall of rain, it would be impossible to make a ditch by which it could be shewn the river was at all times kept down just to that level at which it would have been, if the plaintiff's dam were away, and not lower.

It has been argued, that as the plaintiff's act in erecting his dam was unlawful, and occasioned an injury to the defendant, he must stand all the consequences of defendant's acts, and can sustain no action, because he is himself in fault; that is, either exclusively in fault, or at least in fault as well as the defendant is. And those cases were referred to, where in cases of collision at sea or between carriages on land, when both parties were in some degree guilty of negligence, neither can maintain an action—*Luck v. Seward*,

4 C. & P. 108, and *Luxford v. Large*, 5 C. & P. 425, were cited; and there are many such cases, but they are expressly decided on the principle, that from the carelessness of both parties, it is impossible to pronounce whether the negligence of the defendant really occasioned the injury complained of or not. Where there can be no doubt on that point, there is no difficulty in holding the person liable who clearly has inflicted an unnecessary injury, even although the other party has not been perfectly regular in his conduct; and there have been cases expressly decided on that ground. But these are acts deliberately done by the respective parties at different times, not like a case of sudden collision, where it is impossible to measure the exact degree of carelessness which each has to answer for, when both have been in fault, and still more difficult to determine what share the carelessness of either, had in producing the unfortunate result.

Then, when we look at the pleadings, we see that there is no plea under which the defendant could properly set up such a defence. The court decided, in *Frankum v. Lord Falmouth*, 4 Nev. & Mann. 230, that it is not admissible under the general issue, because that only denies the fact of diversion, not that it was wrongful. I mention this only as an additional reason why this defence should not prevail, for my opinion is that the facts do not furnish a defence.

On the whole I see no good ground for setting aside the verdict though the defendant ought to have succeeded on the first count, because that rests the claim on the possession of the mill, whereas the right in this case does not rest on that ground. The verdict being general, only affects the costs of the first count, and the defendant does not seem to have requested at the trial, that a verdict should be entered for him on the first count.

On the other count the verdict seems to me to be well supported, for it was left to the jury to say, whether the diversion complained of did not arise from the ditches which the defendant had dug; they were satisfied that it did, and they could hardly have any doubt on that point. If there had been no such ditches, the water, in the natural

state of things, though raised in the bed of the stream, would have pressed equally and generally against the sides, and would not have found vent by a narrow ditch into a ravine on the defendant's land. In the course of ages it had not done so, though the evidence proved that it had frequently overflowed the banks altogether, and at all such times, it must have been higher than the defendant's dam can raise it.

Before we could hold that the learned judge ought to have directed the jury absolutely to find for the defendant, merely because the plaintiff had raised the water in some degree by his dam, we must come to the conclusion, that whenever a party erects a dam, which has the effect of keeping back the water above him to a certain height in the bed of the stream, his neighbour higher up the stream, may divert from the stream all the water that would otherwise flow along it. It was proved on the trial, that the stream would at times in each year, rise quite above the banks, or, in other words, higher than the dam can keep it back; and at such times it would be against the fact to say that the defendant's ditches had no other effect, than draining away the water kept by the dam above its natural level.

If the defendant would rest the defence of his act, therefore, on the legal principle, that he had a right to do what was necessary for abating a nuisance, the first answer is, that he had done more than was necessary for that purpose, and has diverted more water than it can be truly said the plaintiff's dam kept back; and, 2ndly, that any defence of that nature must be specially pleaded.

MACAULAY, J.—The sixth issue, being found for the defendant, is not moved against and is not now in question. So the fifth, being an issue in law has been already disposed of. The fourth issue, found for the plaintiff, seems warranted by the evidence.—16 East. 215. The second issue is in favor of the defendant. The third issue is raised under the third plea to the second, third, and fifth counts. The first issue is on the plea of not guilty, and the case at present depends upon the third and first issues. The third plea appears to

me to put in issue only the plaintiff's right to the water, in its natural flow; for the declaration does not now assert anything more, or claim any right to obstruct it by grantor long enjoyment—7 C. & P. 465, *Drewett v. Sheard*; 1 C. & J. 20, *Brown v. Windsor*; 1 Cam. 463, *Balston v. Burstead*; 6 C. & P. 529; 2 A. & E. 425; 4 A. & E. 369-76; 3 B. & Ad. 735; 2 B. & A. 363; 12 Jurist, 292, 504-5. Consequently, the main consideration is the effect of the evidence; under the plea of not guilty.—12 M. & W. 353, *Acton v. Blundell*.

By the new rules, the wrongful act alleged only is put in issue; but upon the best consideration, it does not seem to me that the only fact in issue is whether the defendant dug the ditch, &c., or not—but whether he diverted the water, to the plaintiff's prejudice, which is the wrongful act alleged.—6 M. & W. 665; 3 M. & W. 244-5.

If, under the plea of not guilty, the case could be restricted to the water which has escaped, by reason of the defendant's removing the log or obstruction from the breach or side channel that had been worn in the bank of the river, and which would otherwise, in its natural flow, not have so escaped, I should think him liable, because of such water, it might truly be said he diverted it by a direct act of his own. The difficulty with me is, that it was left to the jury upon the whole evidence; and the verdict may have proceeded upon the ground that the defendant was responsible to the plaintiff for the breach itself, and for the loss of all the water that escaped thereby. Whereas it appears to me that, in the first place, it is a question whether the breach in the bank is not attributable as much to the plaintiff's dam causing back-water, and increasing and continuing the pressure in defendant's close, &c., as to the defendant's drain; and in the second place, that it seems inconsistent with the fact, to hold the defendant liable as having diverted, by reason of his drain, the water which in truth was forced through the breach in the bank, by the plaintiff's own dam obstructing its escape below in the natural flow of the stream.

I am of opinion that, under the plea of not guilty, the

defendant cannot (nor does he) dispute the plaintiff's right to the flow of water in its natural and accustomed course. I think that plea puts in issue only the wrongful diversion alleged; in other words, the injurious diversion by the defendant alleged in the declaration. But at the same time, I think that he may repel the charge of having diverted the water by shewing that in point of fact the plaintiff himself, by obstruction across the stream, forced it out of the natural channel; and I do not perceive how the defendant can be liable, as for his act, in diverting water which the plaintiff himself compelled to escape out of the natural course by his own act.

The case as it appeared in evidence, in relation to cause and effect may be thus regarded. The defendant is charged with diverting the water; that he denies. The proof is that he dug the trench complained of. That is a cause moving from the defendant, but that cause did not immediately and of itself produce the injurious effect. If the trench was then a more remote cause, there being a more immediate cause, this proximate cause is the breach in the bank; and no doubt thereby, or through such breach, much water has escaped from the river into the defendant's drain. But that breach was not the act of the defendant, unless consequentially, that is, unless the ditch was the cause of the breach. Now, no doubt, the immediate cause of the breach was the pressure and wear of the water passing over or percolating through the strata of the bank, into the ditch (whether so passing over or passing through the banks in times of freshets only, or at other times, not distinctly appearing). Consequently the breach in the bank, if aided or facilitated by the ditch, was the combined effect of the water in the river, and the ditch; and such effect became in itself, when produced, the cause of the injurious diversion of the water out of the natural channel of which the plaintiff complains. So far as the ditch and water of the river, in its natural flow, were contributing causes to the breach, the defendant is responsible for the injurious effects; but the breach was not occasioned simply by the operation of these two causes, for the plaintiff did not suffer the water to flow in its natural

course, but impeded it lower down the stream than the breach, and thereby increased the quantity of water in the plaintiff's close, and prevented its escape through the natural channel. Whether this obstruction of the plaintiff, by increasing and continuing the water opposite the defendant's ditch, operated also as a contributing cause in forming the breach was not left to the jury; but that it did more or less and materially contribute thereto, seems evident. And if it did, it would follow that the breach which was the immediate cause of the diversion of the water, arose from the joint acts of the defendant and plaintiff, combined with the natural flow of the stream and the nature of the bank and soil. And if so, then, after the breach, was made, the water that escaped thereby did not so escape in the course of its natural unimpeded descent down the stream, but was (so far as the defendant's dam aided in obstructing it and increasing the quantity) forced out of the natural channel through such breach, by the plaintiff himself. If solely responsible for the breach, as the cause of the injurious effect stated in the declaration, so far as it caused the diversion of the water coming down the stream in its natural flow, whereby it was prevented flowing on in its natural channel to the plaintiff's close, I do not see that he is also responsible for the escape of such water as would have passed on to the plaintiff, had he not obstructed it and thereby prevented it, and forced it out of the natural bed into and through the breach and ditch; unless he shews a legal right to so obstruct the water, and to prevent its freely passing through the defendant's close, by grant of the defendant, or 20 years' enjoyment or upwards, neither of which were proved.—6 C. & P. 529; 2 A. & E. 452; 7 C. & P. 465. The prescriptive right in respect of the mill, alleged in the first count was not proved; and in the other counts, the plaintiff's right is laid in general terms, importing a claim to the natural flow only. He shews no right to force back the water on the defendant's close; and although, if his doing so caused no injury to the defendant, the latter could not perhaps lawfully divert it out of the river to his (the plaintiff's) prejudice, still if the real cause of the

diversion, viz., the breach, is attributable as much to his act as the defendant's, or in a greater or less degree, I do not see how the damages can be apportioned between them.

This rests upon the distinction between a diversion caused by the plaintiff and defendant jointly, and a diversion by the defendant solely, but sought to be justified by him, on the ground of the plaintiff's act working a nuisance to the defendant's close, which he was legally authorized to abate.—2 A. & E. 452; 4 N. & M. 330; 1 H. & W. 1; 6 C. & P. 529; Tyr. Plg. 468. 3 A. & E. 312; 2 M. & W. 745, 770; 1 M. & G. 568, 570; 3 Q. B. 919; 3 M. & W. 244. The former seems to be admissible under the plea of not guilty; the latter, as it would admit the diversion and justify it, should be specially pleaded. It is unnecessary, therefore, to consider whether, if the plaintiff's dam caused a nuisance to the defendant, he could abate such nuisance by draining of the surplus water which caused it, not diverting any more than was necessary for that purpose; because that point could only be raised by special plea, and here we are considering it exclusively under the plea of not guilty. Under the latter plea, I am of opinion that it is open to the defendant to shew that in point of fact he did not divert any or all of the water by acts of his; but that the plaintiff, by his acts, contributed also towards the same effect; and if so, then it was not left to the jury, nor is it quite clear that the learned judge was requested so to leave it.

Upon the suggestion of the defendant's counsel, at the close of his charge, he told the jury that if the defendant's act caused the injury, though aided or aggravated by the plaintiff's raising the water, he thought the defendant liable, and that the only effect of it would be in considering the damages. Now this may have meant, and I understand the learned judge did mean, that (referring to his previous observations, in which the jury were told that if the act of the defendant caused the injury, he was liable, though not so, if the breach resulted from the plaintiff's dam), if the breach was the defendant's act, if the ditch was the sole cause of the breach in the bank, the defendant was liable, though more water escaped by reason of the plain-

tiff's dam than would have otherwise escaped; the words "aiding or aggravated" having relation to the quantity of water escaped through the breach, and not to its agency as a contributing cause in creating the breach itself.

From the argument of Mr. Freeman, the defendant's counsel, in support of this rule, I infer that he intended to be otherwise understood at nisi prius, and as meaning to object that if the defendant's dam aided in making the breach, and likewise aggravated the loss of water escaping thereby to an undefinable extent, the diversion was the joint act of both parties, and the damages not apportionable; and I think the facts of the case fairly raised such a question, and that it ought to have been submitted to the jury, for in that event (as at present advised) it appears to me it would constitute a good defence under the general issue.—2 C. & K. 157.

In some of the cases in which mutuality of fault have been held good defences and proveable under the general issue, stress is laid upon the circumstance that both defendant and plaintiff are immediate actors, as in many instances of collisions, while in others no such immediate co-operation could be alleged. In some, that the whole fault rested at the plaintiff's door, in which event (in case, though otherwise in trespass) it would constitute a good defence under the general issue, as repelling the negligence imputed to defendant. In others, it has been said that the damages are not apportionable; where both plaintiff and defendant have received injury, and both are in fault.—See M. & M. 546, N. 1. The general rule seems to be, that where the defendant contributes to the act which causes him an injury, he cannot make it the ground of an action, as being the fault of another; and if that be a general principle of law, I do not see why it is not applicable to the present case.

The maxims in *æquali jure* and in *pari delicto potior est conditio possidentis* or *defendentis* may be fairly applied, as well as that of *sic utere tuo ut alienum non lædas*.—Brown's Maxims, 160, 1, 323-4. Here the defendant dug a ditch in his close, without any evil intent that was proved or found by the jury. That in itself was an innocent act, whether he was induced to do it entirely by reason of his

close being more saturated or covered with water, by reason of plaintiff's dam, or might have found it equally necessary to drain the land, had the plaintiff not obstructed the natural flow of the river. Then had the flow of water been suffered to remain in its natural state, would the same consequences have ensued? If so, that was not left to the jury; but if not, or even if so, still the question remains, whether the plaintiff did not conduce towards, and facilitate the breach in the bank, by unauthorised obstruction of the water, and accumulating the quantity of bank-water in the channel in the defendant's close, whereby the injury was in part occasioned. If so it seems to me to come within the principle of the cases, and should have been left to the jury. Otherwise the plaintiff is in effect taking advantage of his own wrong to support an action against defendant, as for the defendant's wrong.

If we are at liberty to advert to the defendant's cross action against the plaintiff, tried at the same assizes, and the result thereof, the inconsistency is exemplified. For if the defendant is entitled to recover against the plaintiff, for overflowing his land by backwater, although it may have escaped through the breach in the bank (unless the portions of water thereby escaping could be separated from other quantities escaping elsewhere, which seems impossible), it is plainly inconsistent that the plaintiff should at the same time be entitled to recover against the defendant, for diverting that very water to the plaintiff's prejudice. The two cannot consist together; and the very proposition seems to me to establish the point contended for by the defendant's counsel, viz., that it ought to have been left to the jury to say whether the plaintiff's own conduct, in penning back the water, co-operated in producing the breach in the bank of the river and the consequent escape of the water, for diverting which to his injury he complains of the defendant. It cannot be true that the defendant caused the diminution or diversion complained of to the plaintiff's prejudice, if the plaintiff himself was equally the cause of it, or materially contributed towards it. Can the parties reciprocally sue each other; the plaintiff, because defendant

diverts the water to his injury, and the defendant, because the plaintiff (by backing the water) overflows his land? I apprehend not.

In an action by the defendant against plaintiff, for overflowing his land by means of the back-water, could the plaintiff shew that the flooding was caused as much or more by the defendant's trench than by his dam, and, if so, would that constitute a defence? I should think it would. The present is the reverse of such a case. (a.)

DRAPER, J., concurred in opinion with the Chief Justice.

MCLEAN, J., & SULLIVAN, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Rule discharged.

MACAULAY, J., *dissentiente*.

(a) See the following cases upon the general law, as to the right of parties through whose closes a stream of water flows—3 B. & Ad. 304; 5 B. S. & Ad. 1; 2 N. & M. 747; 8 Bing. 204; 6 Ea. 208; 2 B. & C. 910; 5 M. & W. 203, 234; 18 Pick. 117; U. S. Repts. ; 2 Bing. N. S. 134; 12 M. & W. 349-52.

See also the following cases of collision, and other accidents where the fault appears on both sides—1 M. & N. 169; 5 C. & P. 375, 421; 1 C. & M. 21; 3 Tyr. 85; 4 C. & P. 106; 3 U.C. R. 189; 10 Bing. 112; 6 C. & P. 23; note (g).

See the general proposition qualified by 11 Ea. 60; 3 M. & W. 244; 10 M. & W. 546; 1 Q. B. 28; 1 M. & G. 568; 6 C. & P. 23; 1 M. M. 362, 154, 214; Whitmore v. Wilkes—in all of which it was considered; that although the defendant had not been without fault, yet the plaintiffs having themselves been in fault also, were not entitled to recover.

The note in 1 M. & M. 365, suggests the question or test whether, in the present case, the breach in the bank and the consequent loss of water would or would not have happened had it not been for the plaintiff's conduct in raising the water and penning it back to an unauthorized degree; in other words, whether the injury complained of, would have had any existence whatever, had it not been for the conduct of the plaintiff—as if the ditch had been dug several years before the plaintiff increased the back-water, without any injury ensuing to the bank of the river—though it aided therein after the plaintiff had raised the objection and caused the backwater,—what was the immediate and proximate cause of the damage? was it the plaintiff's act in accumulating back or flood water?—See 3 B. & Ad. 871; 1 A. & E. 493; 3 N. & M. 739; 9 B. & C. 725; 4 M. & R. 625; 4 Bing. N. S. 142, Gould v. Oliver. Tindal, C. J., speaks in this last case, of the general rule of English Law, that no one can maintain an action for a wrong where he has consented or contributed to the act which occasioned his loss—2 Saund. 394, 400; 5 B. & A. 837; 4 C. & P. 161; 3 Bing. N. S. 334; 3 M. & W. 220; 2 Taunt. 314; 10 Jurist, 883; 3 C. B. 1; 15 Law Journal, N. S. 301, 315.

WRIGHT V. BENSON.

Indemnity bond—old debts—new advances. The construction of an indemnity bond—as to whether it made the obligor liable for old debts, or only for new advances from the date of the bond.

The plaintiff sued in debt on bond, made 17th September, 1845, setting out the condition, whereby reciting, that whereas the defendant and the plaintiff had jointly “and severally agreed to become security, and to advance or cause to be advanced a sum of money, amounting to 500*l.*, for the space of two years, from the date thereof, to one John Benson, upon certain conditions to be kept by the said John Benson, and that the plaintiff was bound to the defendant, by his bond, for the securing and procuring 250*l.*, part of the said 500*l.*, for and within the time aforesaid; and that the defendant had agreed to hold the plaintiff harmless in case of failure of payment of the said sum 250*l.*, to be advanced as aforesaid to John Benson, by the plaintiff.” It was declared to be the condition of the bond sued on, “that if the defendant should indemnify, and save harmless the plaintiff, his executors and administrators for the said 250*l.* to be by him secured, or advanced to John Benson in manner, and during the time aforesaid—then the obligation to be void.

The plaintiff averred that the conditions of the advance to John Benson were, that he should repay the same at the end of two years, from the date of the bond, which period had elapsed before this action was brought: that the plaintiff secured, procured and caused to be advanced to John Benson the 250*l.*, according to the condition; that he, the said John Benson, had not repaid the same according to the condition on which it was advanced, and charges as a breach of the condition by the defendant, that he had not kept the plaintiff harmless; and that although he had requested the said John Benson and the defendant to repay him the said 250*l.*, yet they had neither of them done so.

The defendant pleaded *non est factum*.

2ndly. That the plaintiff did not advance the 250*l.* to John Benson, or any pay part thereof, as stated.

3rdly. The defendant set out what he alleges were the

conditions on which the 500*l.* was to be advanced to John Benson ; viz., that the 500*l.* was to be received and applied by him to the carrying on, during the two years, the business of a merchant, and to be used by him in his business, and to be repaid at the end of the two years ; and that no part of the 500*l.* or 250*l.* was advanced or procured to be advanced by the plaintiff, to John Benson, within the two years for the purpose, and to be used by him in manner agreed upon ; but for other and different purposes and uses—and the defendant traversed the advance alleged to be made by the plaintiff to John Benson, as in the declaration mentioned.

Upon the trial, John Benson was examined as a witness, and stated that he had contemplated getting advances from Lower Canada—and that the plaintiff and the defendant proposed to assist him—that he took down a letter of credit from the defendant to Montreal—that he did not get the credit and returned the letter—that the plaintiff was with him in Montreal, and endeavoured to procure the credit but failed ; that he afterwards had a settlement of accounts with the plaintiff, and acknowledged a balance due him on an account produced at the trial, of 200*l.* 0*s.* 1*d.*, and stated in writing, at the foot, that he had received from Paul Wright (the plaintiff,) the above payments, “on account of a bond or agreement between Samuel M. Benson and P. Wright.” This settlement, it seemed, took place on 18th March, 1847.

This account consists of several items—1stly. 98*l.* 1*s.* was an unpaid balance of an old debt from John Benson to plaintiff, for which a renewal note was outstanding, made by John Benson, and endorsed by plaintiff ; the debt had been incurred before the bond sued on was made.

2ndly. 7*l.* 16*s.* 7*d.* was a balance of a debt contracted by John Benson, with plaintiff, since this bond was given, for which plaintiff held his note.

3rdly and 4thly. 27*l.* 13*s.* 6*d.* and 2*l.* 19*s.* 6*d.* were charges for money paid by the plaintiff, to Lasher & Stevenson, for John Benson, being for a debt due in 1844.

Then there was an item of 63*l.* 17*s.* 6*d.* which was for

a note of John Benson for money obtained for him from a Bank. It was at first a note of 80*l.*, and the above sum was a note which the defendant had made and the plaintiff indorsed, and this sum was due for a renewal note. The 80*l.* had been got to enable John Benson to pay a debt due by him, before this bond was made. It had nothing to do with the bond—but the renewal note was given after the bond.

On this evidence the plaintiff received a verdict, at the trial, for 105*l.* 4*s.* 3*d.*

And defendant, by *J. H. Hagarty*, moved for a new trial on the law and evidence, or for misdirection.

Affidavits were filed by the defendant on moving his rule—but the rule *nisi* did not profess to be grounded on affidavits, and they could not therefore be used. They only corroborated what the evidence on the trial proved.

Walbridge, shewed cause.

The cases cited were—18 *Vez.* 20; 6 *Vez.* 805.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that there should be a new trial without costs. The object of the security was to procure a new advance, not to make the obligor liable for an old debt. The same point has arisen in actions upon guarantees—and here the very words of the condition are clear and express; the defendant only undertook to save the plaintiff harmless in respect to 250*l.* to be by the plaintiff, secured or advanced to John Benson, on a credit of two years. The instrument shews that an additional and new credit was contemplated, and the defendant pleads that this was in order to enable John Benson to go into business as a merchant, and that no advance of that kind was made. The plaintiff, on his part, does not deny the object of the security, but denies and takes issue on the defendant's plea. The defendant *proved* his plea at the trial, and was therefore entitled to a verdict.

We think no one item spoken of, came under the condition; and that the jury should have been directed in express terms to that effect.

Per Cur.—Rule absolute—new trial without costs.

BLEEKER V. MEYERS.

It is only in very plain cases that the court will grant a new trial at the instance of a plaintiff, who has already a verdict for something.

The 18th Eliz. ch. 5, prohibits the compromise of a *qui tam* action, without the leave of the court. Where therefore a plaintiff who had brought such an action, agreed to drop it upon being paid his costs, and in a subsequent action for these costs, recovered much less than he thought the jury should have given him, and applied to the court for a new trial; the court, from the nature of the transaction, refused to give him any relief.

The plaintiff sued in assumpsit.

In the first count he set out that he had instituted a certain action of debt, *qui tam*, against the defendant, and while it was depending, it was agreed between them, that in case the plaintiff would forbear to proceed further in the said action, the defendant would pay the plaintiff in six weeks his costs incurred, including the retaining fee to be paid by the plaintiff, to his attorney—and the plaintiff claimed 21*l.* 9*s.* 6*d.*

Common counts were added.

The defendant pleaded non-assumpsit, except as to 10*l.*; and as to that, payment of 20*l.*, in full satisfaction of that sum and all damages.

The plaintiff joined issue.

The plaintiff had not had any bill taxed, but gave evidence, by his attorney's clerk, of the services rendered in the cause, and it was left to the jury who allowed only the 7*l.* 10*s.*—he claimed about 13*l.* more.

The defendant's attorney made affidavit deposing that defendant frequently admitted the amount due, and he supposed he would not contest it, or he would have been better prepared to prove the amount due.

The defendant swore that this was untrue—that he objected to many of the items, and that the plaintiff's attorney knew he would contest the demand.

Verdict for the plaintiff, 7*l.* 10*s.*

G. Duggan moved for a new trial on affidavits. Crooks shewed cause.

ROBINSON, C. J., delivered the judgment of the court,

The plaintiff in this case having recovered a verdict of 7*l.* 10*s.* moves for a new trial, because he ought as he alleges to have recovered 13*l.* more, but was defeated in his

claim by the defendant contesting at the trial unfairly, what he had before agreed to pay.

The defendant denies this, and, so far, does not leave clear ground for our interposing, and it should only be in a plain case that we should do so at the instance of the plaintiff, who has already a verdict for something.

But we are of opinion, that it is a decisive objection to our granting any relief, that this appears to be a case in which the plaintiff is claiming costs, agreed, as he says, to be paid him in consideration of his doing what is expressly prohibited by an act of parliament—18 Eliz., ch. 5. This is compromising a *qui tam* action without leave of the court. The plaintiff, it seems, had sued the defendant on behalf of the Queen and himself, for 500*l.* penalties, and consented to drop his action on being paid his costs.

It is not a case entitled to any extraordinary indulgence of this court, and as to the alleged surprise in finding the claim disputed, a party has no sufficient reason to hold himself relieved from the necessity of proving on the trial, whatever is necessary to his case, unless he is prepared to shew, by clear evidence, that the opposite party has expressly agreed to admit it. He must be prepared, one way or the other, to make out his demand. If he relied on an admission, he should have proved it. The evidence which he did give of his demand, was fairly submitted to the jury—and they did not allow it.

Per Cur.—Rule discharged.

DOE DEM. OSBORNE V. McDougall ET AL.

Semble—That a plaintiff in ejectment, relying in the opening of his case upon a *prima facie* title by possession, and being met by proof on the part of the defendant of a prior possession, cannot repeal such proof by attempting to shew the possession of defendant—that a tenant to him (the plaintiff,) as landlord—he should go into his case fully in the first instance.

ROBINSON, C. J., *dissentiente*.

Demise laid 1st June, 1848. Ouster 3rd June, 1846.

The evidence shewed the premises in question to be a tract of land in the city of Toronto, on the west side of a lane, south of Boulton-street, on which there are three tenements,

that in July, 1847, there was an unfinished building, or shell, on the premises, at which period mechanics were employed by the lessor of the plaintiff to finish the same; that they received the key from him, and were employed upon the work till October; that at that period, a family was admitted into the occupation of the upper part, by the lessor of plaintiff: that the next day, the defendant, Mr. McDougall, entered and obtained possession of the residue, surreptitiously, and adversely to the lessor of plaintiff, and had continued in possession ever since: that the family admitted under the lessor of plaintiff, remained and paid him rent until the head of it, the husband, died, about seven months afterwards, when his relatives left the premises. Nothing was said of the other two defendants; nor was any paper or other title shewn, other than possession, as proved by the lessor of the defendant's workmen, and the widow above mentioned.

On the defence, it was proved that there had been a former dwelling house on these premises, in which Mrs. Macdougall's husband and family had lived until the year 1844, when a fire occurred, by which it was consumed. Other houses had been destroyed on the same occasion, and the neighbours raised a fund, by subscription, for the relief of the sufferers. A portion of this fund was raised by Macdougall; and with the aid thereof, and the assistance of some mechanics, the shell in question had been erected. The new building was not finished, but a part of it was rendered habitable, and he lived in it a year or two, till he died, leaving the defendant, his widow, in possession. She continued to reside there for some time, when her reduced circumstances obliged her to go out to service. On leaving it she leased it for some time, but eventually the house became vacant, and subsequently the lessor of the plaintiff acquired possession; but how, did not appear. One of the witnesses for the defendants said, that Macdougall owned the former house, and his father before him; but no paper or other title, than as above stated, was shewn. In reply, the counsel for the plaintiff re-called one of the defendant's witnesses, and wished to ask him whether the

defendant (Macdougall), or rather her husband, had not entered under the lessor of the plaintiff, as his tenant. This was objected to by the defendant's counsel, as going into a new case. He contended that the plaintiff, having rested his own case upon mere proof of possession in 1847, which was met by proof of a prior possession on the defendant's part, could not in reply shew a still earlier possession, and that Mrs. Macdougall's husband entered originally as the tenant of the lessor of the plaintiff.

It appeared to the judge at nisi prius (Macaulay, J.) that as the case had been opened as one between landlord and tenant, but had been rested merely on the priority of possession, as *prima facie* shewn by the plaintiff's evidence in chief, it would in effect be setting up a new case to allow the evidence offered. The court held that the plaintiff should have gone into his whole case at once, and proved whatever title he meant to rely upon.

The plaintiff's counsel then said he wished to shew acknowledgment of title in the lessee of plaintiff, by D. Macdougall, the husband of defendant, as his landlord, and rent due up to a certain period. This was overruled, not on the ground that the defendant could set up any adverse right, or dispute the plaintiff's title, if the alleged tenancy of her husband could be proved; but on the ground that it was inadmissible in reply, as not rebutting the facts proven on the defence, so far as they went, but, in effect, setting up a new case. A tenancy set up in reply, might lead to a new defence and give rise to a variety of new questions—as, whether there was a tenancy, whether oral or in writing, the terms, amount of rent, right to notice to quit, disclaimer, &c. It seemed to open quite a new case. Owing to the view taken by the court, the plaintiff was non-suited, that is, his counsel took a non-suit, with leave to move in banc to set it aside.

Gamble obtained a rule to shew cause, why the non-suit should not be set aside. Cameron, Q. C., shewed cause. The authorities cited were—1 Campb. 473; 1 Stark, N. P. C. 72; 2 Stark, 31; 3 M. & R. 139; 5 N. C. R. 346; 12 Jurist, 517, Q. B.

ROBINSON, C. J.—I believe my brothers, in this case, are of opinion that the non-suit was rightly granted, but are inclined to allow it to be set aside, and grant a new trial on such terms as seem just.

The point is very much such as arose in *Rowe v. Brenton*, 3 Mg. & Ry. 139, 281, where *Rees v. Smith et al.*, 2 Stark. N. P. C. was referred to, and it seemed there to be conceded that when the plaintiff is aware by the pleading, or otherwise, of the defence which the defendant means to set up, he must go into his whole case at once.

The rule is rather a difficult one to apply under all circumstances. I do not, I confess, see clear ground for its application here. After considering the manner in which this point of *nisi prius* practice is treated of in Mr. Starkie's *Treatise on Evidence*, 1 vol. 425, and in *Phillips on Evidence*, I am under the impression that the testimony should have been received here, to repel that given by the defendants.

The lessor of the plaintiff gave, in the first place, that evidence of possession which is constantly received as sufficient *prima facie* evidence of title, to enable him to recover against a stranger. The defendant then gave evidence that he also had been in possession before the lessor of the plaintiff had been, and could therefore claim the same presumption of title, and of an elder title. In answer to this, the plaintiff desired to shew what had been the nature of the possession which the defendants had thus set up, in order to repel the inference of title which might otherwise arise from the mere fact of their possession.

This was not, as is said in 4 Mg. & Ry. 281, "supporting his former proof of possession by evidence of title;" nor does it strike me to be correct to say, that the plaintiff was thereby setting up a new case as landlord; he only desired to shew that the defendant's possession, which came out as a perfectly new fact on the defence, was not a possession as upon an independent title, and from which, title in the defendant could be inferred; for that it was a mere permissive occupation held under him, the lessor of the plaintiff, just as he might have shewn that the defendant's former possession had been as servant or agent of the plaintiff, or

as a mere trespasser, and that he had quitted it at once when desired to do so.

I have always understood that the plaintiff is at liberty to repel new and distinct facts given in evidence on the defence—and in *Rees v. Smith* that is admitted, and the principle placed on grounds, which would have admitted the evidence in this case.

This opinion, however, on my part, would only have the effect of leading me to give relief to the plaintiff on more favourable terms. He may, by the judgment of the court, have a new trial with costs to abide the event.

MACAULAY, J.—I rejected the evidence offered in reply, in this case, with a recollection of the case of *Doe dem. Lawrence v. Stalker*, which had been decided in this court not long before; but I consider the present distinguishable. All I said in that case was, that, in my opinion, the learned judge who tried it, might have permitted the lessor of the plaintiff to give the evidence then offered in reply—but that according to the cases, he was not bound to have done so, although I thought it would have been a sounder exercise of his discretion to have allowed it.

It appeared to me, in the present case, that the plaintiff was going into an entirely new case from that which he opened and relied upon in chief. It may, however, be said that it was not offered with that view, but to explain the possession which the defendants set up, and therefore directly repelling the defence; and, in this light, there are cases that would no doubt warrant it—although the effect might be to require a new defence to be gone into, in reference to the alleged tenancy.

Strictly, I should think the plaintiff should have gone into this case fully in the first instance, and not have relied upon a naked and recent possession, reserving to himself the right to go farther back with his title, step by step, as the defendants might destroy it by their evidence—2 *Star.* 31, *Rees v. Smith*; 3 *M. & R.* 139, 281; 12 *Jurist*, 517, *Jacobs v. Tarleton*, *Q. B.*

McLEAN, J., & SULLIVAN, J., concurred in opinion with Mr. Justice MACAULAY.

Per Cur.—New trial, costs to abide the event.

WRIGHT V. WEED.

Upon an agreement to deliver wheat *for* the plaintiff, at the mill of a *third party*, naming him, the plaintiff averred, in his declaration, "that he was always willing to accept the wheat at the place aforesaid, and to have paid the defendant for the same, at the rate in that behalf aforesaid; whereof the defendant had notice." *Held per Cur.*, on a motion to arrest the judgment—declaration good. *Held also*, that it was not necessary for the plaintiff to prove, under this agreement, a request on his (the plaintiff's) part to the defendant to deliver—or that he was at the mill of the third party, on the day named, to accept a delivery of the wheat.

Assumpsit: the plaintiff declared, in the first count, for that whereas the plaintiff, on the 17th March, A. D. 1848, at the request of the defendant, bargained for and agreed to buy from the defendant 1,500 bushels of merchantable wheat, viz., 1,000 bushels of merchantable wheat at 3s. 7d. per bushel, and 500 bushels of merchantable spring wheat at 3s. 3d. per bushel, *to be delivered for plaintiff*, on or before 17th April, 1848, at the mill of Thomas Burrell, in the Gore of Toronto: and in consideration of the premises, and that the plaintiff at the request of the defendant, had then promised the defendant to accept a delivery at the said mills, and to pay the defendant for the same at the rate aforesaid, the defendant, on the day and year first aforesaid, promised the plaintiff to deliver the said wheat. The plaintiff then averred that he was always willing to accept the wheat at the place aforesaid, *and to have paid the defendant for the same, at the rate in that behalf aforesaid, whereof the defendant had notice*; and that although the defendant did, in the time, deliver to him 44 bushels of the said wheat, yet he did not within the time agreed upon or at any time since deliver the residue.

The defendant pleaded, 1st, the general issue.

2ndly. That the plaintiff, at the said time, when he requested the defendant to deliver the said wheat, refused to pay him for the same, although requested by the defendant so to do, traversing specially the defendant's readiness to pay as averred, and the plaintiff joined issue.

Verdict for the plaintiff, 50*l*.

Bell obtained a rule for a new trial on the law and evidence and for misdirection, or to arrest the judgment. *Duggan* shewed cause.

The authorities cited were—12 M. & W. 431; 7 T. R. 125; Salk. 624; 6 Bing. N. C. 174; 5 Bing. 34; 12 Mod. 531; 6 E. R. 307; 1 Marsh, 412; 2 B. & P. 447.

ROBINSON, C. J., delivered the judgment of the court.

There can be no ground here for arresting the judgment. The averment that plaintiff was always ready and willing to receive the wheat at the place aforesaid, and to have paid for the same, is certainly all that is required; for it plainly means that he was willing to receive and pay for it at the place aforesaid; and if there was any thing that could have been excepted to on general demurrer, the defendant has taken no exception, but has pleaded over, traversing specially the plaintiff's readiness to pay as he had averred.

Then, as regards the evidence on that point given at the trial, the agreement here was not to deliver *to* the plaintiff, but *for* the plaintiff, at the mills of a third party; the plaintiff, therefore, was not bound to be there in person, on the day, to accept a delivery, for the wheat was to be delivered to the person in charge of the mills, *for* him. The evidence of a partial delivery shews that the parties understood this, and the confessed inability of the defendant to be punctual, and his hope expressed that the plaintiff would not be strict with him as to the day, were sufficient to satisfy the jury that the defendant's default was not owing to the cause which he alleged in his defence, namely, that the plaintiff was not ready to pay.

Then there was no occasion for a request on the plaintiff's part. The defendant had undertaken to deliver the wheat *for* the plaintiff, at a certain place, on a certain day; he could not expect the plaintiff to be there in person to receive and pay for the wheat, when he had been making excuses for not being able to keep his time. The jury were well warranted, I think, in assuming that if the defendant had been there with his wheat, which it is clear he was not, he would have had no difficulty in receiving his money.

Per Cur—Rule discharged.

MCNAB V. MCGILL.

Lumber trade—liability of parties.

A. was cutting timber on B.'s land. B. refused to allow him to cut it unless C., the party who was to get the timber when cut, should become answerable to A. for it. C. agreed to become so, and A. was permitted by B. to take away the timber. It was further agreed, between B. and C., that upon the timber being passed at Bytown, free from duties to the government (that is, passed as private timber), B. should be paid by C. the price the government would have paid for it, had it been Crown timber. *Held, per Cur.*, that upon the verbal agreement, B. could sue C. upon the common count, for goods sold and delivered, when the time arrived for passing the timber through Bytown; and also, that upon a sale of the timber at Quebec, C. might be liable to B., on the common count for money had and received.

Assumpsit on common counts, for goods sold and delivered, money had and received, and account stated.

Plea: non-assumpsit, statute of limitations, payment.

One Yule was getting out timber on the plaintiff's land, for which a certain price per foot was to be paid. The plaintiff refused to let him cut the timber, unless the defendant, into whose hands it was to go, would become answerable for the dues, as they were called there; and the defendant's agent at Bytown became answerable for them, and the plaintiff allowed Yule to take the timber. Such at least was the case the plaintiff proved, and the weight of evidence seemed to be in support of it.

Verdict for plaintiff, 174*l.* 9*s.* 2*d.*

Eccles obtained a rule for a new trial, on the law and evidence and for misdirection. *Phillpotts* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We can only judge of the case from the evidence given. That, on the part of the plaintiff, if it had been unopposed, established a case free from difficulty, as I think, under the count for goods sold and delivered, or under the count for money had and received.

The timber according to Yule's account of the transaction, was to pass into the hands of the defendant and his partners, upon terms understood no doubt between them and Yule, and into which there is no necessity to inquire; that concerned only themselves.

The plaintiff, as owner of the timber, had a right to say it should not be cut, or at least not removed, unless the

defendant would undertake to pay him for it, at so much per foot, being the ordinary government price for timber cut on crown land; and the defendant, through his managing agent, thereupon agreed, and the timber was allowed to be taken upon that promise.

As soon as it was cut it became a chattel, and no difficulty arises for want of an agreement in writing. The plaintiff's claim is not restricted to a claim as upon a sale of standing timber. What he stipulated for was that, on its being passed at Bytown free from duties to the government (that is, passed as private timber), he should be paid by the plaintiff the price that the government must have been paid if it had been crown timber. When the time should arrive for passing it at Bytown, it must necessarily have been a chattel, and then the defendant's promise to pay for it as timber bought from the plaintiff, would first attach.

Unless we disbelieve Mr. Yule's evidence, the plaintiff refused to look to him, and would take only the defendant's undertaking, in which case it was the defendant, who was primarily liable, and for the sufficient consideration of an advantage to accrue to himself. He was thereby to get timber which he could not otherwise have got, and would of course have had so much less to pay to the person who got it out on account of his purchase.

Upon the sale of the timber at Quebec, the defendant (supposing Yule's evidence to be correct) would of course withhold, on account, so much of the proceeds as would pay the price for the trees which he had become liable for to the plaintiff; and I do not see why an action should not lie under the count for money had and received on that principle, if it were necessary to resort to it, which would be the case if the timber could not be properly looked upon as sold to the defendant. In one way or the other, I consider the action must lie, if Yule's evidence be credited.

Then we have to consider the evidence given by the defendant's witness. It tended in one respect to corroborate Yule's account of the matter; for it shews that the witness had at one time, been himself under the impression that

Yule was not to settle with the plaintiff, but that the defendant was to do so. He observed, he says to Yule, "*if you are to pay the dues, then so much more will be coming to you.*" But however difficult it was to reconcile the evidence on the defendant's part with the plaintiff's evidence, it was for the jury to determine, as well as they could, the question of fact; and we cannot say that they found the verdict without evidence, nor against the weight of evidence.—McDonell v. Cook, 1 U. C. R. 542.

Per Cur.—Rule discharged.

MCARTHUR V. WINSLOW.

Pleadings—sale of land—executed and executory considerations—necessity of precise averments in pleading—conveyance of land—or a readiness to convey—when to be averred as a consideration precedent before demand of purchase money.

The plaintiff stated in his declaration, that in consideration that the plaintiff, at the request of the defendant, *would* (as by the said agreement the plaintiff in fact did,) sell to the defendant certain premises; he, the defendant, undertook that he would pay the plaintiff for the said premises certain sums of money in good notes, and at the times, &c. (as below alleged;)—breach—that though the plaintiff was ready to accept the notes, and had performed all things to be by him performed—the defendant had altogether failed in his agreement, &c. *Held, per Cur.*, upon demurrer to declaration—declaration bad, in not averring in precise terms that plaintiff had conveyed the premises, &c., to the defendant, or was ready and willing to convey.

MACAULAY, J., *dissentiente*.

Semle—that payment in "good notes," does not necessarily mean in "good negotiable notes."

Declaration—For that, whereas, by a certain agreement in writing made heretofore, and before the commencement of this suit, to wit, on the 15th day of June, 1848, and bearing date that date, between the plaintiff of the first part and the defendant of the second part, he, the defendant, for and in consideration that the plaintiff at the request of the defendant, would, as by said agreement, the plaintiff in fact did sell to the defendant all that certain premises of the plaintiff, called and known as the Thorold House, with the appurtenances thereto belonging, and situated in the village of Thorold, in the said district, agree and promise to and with the plaintiff, that he, the defendant should and would pay to the plaintiff, for the said premises, the full sum of

\$2,500, amounting and equal to the sum of, 625*l.* of &c., in manner following, that is to say \$500 equal to the sum of 125*l.* of, &c., parcel of the said sum of \$2,500 to be paid down (meaning immediately after the making of the said agreement,) \$600, equal and amounting to the sum of 150*l.* of like lawful money, other parcel of the said sum of \$2,500 to be paid in good notes, meaning in good negotiable promissory notes, to be delivered by the defendant to the plaintiff, within a reasonable time after the making of the said agreement. As to \$800, amounting and equal to the sum of 200*l.* of like lawful money, other parcel of the said sum of \$2,500, that the defendant should, within a reasonable time after the making of the said agreement, become responsible for that amount to and with one James Oswald, in the said agreement described and referred to as Mr. Oswald, to whom the plaintiff, at the time of the making of the said agreement, was indebted in that sum, and who had agreed at and previously to the making of the said agreement, and has always since been ready and willing to accept the defendant as security thereof, and then release the plaintiff therefrom. And as to \$600 equal and amounting to the sum of 150*l.* of like lawful money, the remaining parcel of said sum of \$2,500, that the same should be paid at certain times and in a certain manner in the said agreement stated and agreed upon. And the plaintiff in fact saith, that although a reasonable time for the delivery by the defendant to the plaintiff of the notes as agreed upon in manner aforesaid, to the amount of 150*l.*, and for the defendant becoming responsible to the said James Oswald for the said sum of 200*l.*, had elapsed long before the commencement of this suit, and although the plaintiff hath always been ready and willing to accept such notes according to the tenor and effect of the said agreement, and hath performed all things therein contained by him to be done and performed according to the true intent and meaning of the said agreement, and although the said James Oswald hath always been ready and willing to accept the responsibility and security of the said defendant for the said sum of 200*l.*, and to then release the plaintiff therefrom, and all liability in respect

thereof yet the defendant hath not as yet paid the said sum of \$500 equal as aforesaid to the sum of 125*l.* nor any part thereof, nor paid to the plaintiff in notes as aforesaid, nor in any other manner, the said sum of \$600, equal as aforesaid to the sum of 150*l.*, nor any part thereof, nor become responsible to the said James Oswald for the said sum of \$800, equal as aforesaid to the sum of 200*l.*, or any part thereof, nor paid the same or any part thereof, to the plaintiff or the said James Oswald, and this the defendant hath wholly neglected and refused to do.

Demurrer—that the plaintiff hath not alleged that he tendered or offered any conveyance to the defendant of the said land, and also that it is not certainly averred that the plaintiff did sell the said premises to the defendant, nor is there any allegation of time to the fact of such sale—also, that the plaintiff has enlarged the meaning of the term good notes, in the said agreement, to good negotiable promissory notes, which the said term good notes, does not import—and also that it is uncertain what responsibility the plaintiff intends in the said declaration to be incurred by the defendant to James Oswald.

Cameron, Q. C., for the demurrer. *P. M. Vankoughnet contra.* The authorities cited were—*Barnes v. McKay*, 5 U. C. R.; 12 Jurist, 155; 9 Irish Law reports, 175; 1 Lord Ray, 735; 2 Esp. Rep. 708; 1 Saund. 319; 10 M. & W. 355; 10 A. & E. 50; 6 T. R. 572; Dougl. 37; Willes, 332; 3 Bing. N. C. 717; 6 M. & W. 612; 6 Bing. 244; 6 B. & C. 433; 3 M. & Gr. 576.

ROBINSON, C. J.—The plaintiff complains that no part of the agreement set out has been performed by the defendant.

If the 125*l.* which was to be paid down had been paid, it would have furnished an argument that the defendant had received the consideration for which he stipulated, either in the agreement which the plaintiff had given him, or by the actual performance of it; and that the other payments were therefore to be made without reference to the further performance of anything by the plaintiff.

As it is, the plaintiff suing for the sum to be paid down, as well as for the others, we must look whether the plaintiff had occasion to shew anything to be done on his part,

before he is in a condition to claim; and whether he has sufficiently shewn that he has done what was incumbent upon him.

Now all that the plaintiff sets out is that in consideration that the plaintiff at the request of the defendant, would (as *by the said agreement* the plaintiff in fact did,) sell to the defendant certain premises, &c., he, the defendant, undertook that he would pay the plaintiff for the said premises \$2,500 as follows, viz.: 125*l.* to be paid down, (meaning immediately after the making of the agreement), 150*l.* in good notes, within a reasonable time after the making of the agreement—for 200*l.*, defendant undertook to become responsible to a Mr. Oswald on account of the plaintiff, within a reasonable time after the agreement, and the remaining 150*l.* he was to pay at certain days and times, in the manner mentioned in the agreement. And the plaintiff complains that although a reasonable time had elapsed for the defendant delivering the notes, and for becoming responsible on account of Mr. Oswald, and although he has always been willing to accept the notes, &c., and Mr. Oswald having been ready and willing to accept his responsibility and to relieve the plaintiff, and although the plaintiff has performed all things to be performed by him according to the interest of the agreement. Yet, &c., that the defendant has failed in every part of his agreement.

Now, in my opinion, the plaintiff has not sufficiently entitled himself to sue for the money. His declaration leaves it in doubt whether he is suing upon an agreement made upon an executory consideration or not. He first states that the defendant undertook, in consideration *that the plaintiff would sell, &c.*,—then he is apparently relying upon an executory consideration which makes it necessary that he should shew performance, and shew it precisely and distinctly, for, according to that averment, the defendant only engaged to pay money in consideration that the plaintiff would sell to *him* certain premises.

But then he changes ground, and seems to be suing as upon an executed consideration, for he says, "as by the said agreement, he did," thereby referring to the con-

struction and effect of the agreement which we do not see, and which might or might not amount to an absolute sale of the property. And, at all events, if the plaintiff felt that the instrument to which he refers, was in itself an actual sale, then he should have averred unequivocally that he had sold instead of saying, "as by the agreement he did."

The same objection which was taken in *Barnes v. McKay*, in this court (5 U. C. R. 246), applies in some measure here, and in that case we referred to *Plowden's Report*, 143, *Browning v. Beston*, in which the court says of an averment in this manner, that it was not a precise allegation, but is an affirmation that the indenture says so, and the party himself ought to say so, and not say that the indenture says so, for this saying that it is contained in the indenture, is not an affirmation of the thing which is mentioned to be contained in the indenture.

The declaration here carries this appearance, that the defendant having by the agreement engaged that if the plaintiff would sell him certain property, he would make him certain payments; contemplating at the time a future and distant act of selling, the plaintiff is turning round upon him and maintaining that he requires no further sale or conveyance, for that the agreement is so worded as to be a sale of itself, and this too he asserts of an instrument not under seal, for the plaintiff makes no profert, and the action is in *assumpsit*.

I am of opinion that the declaration is, on this account, bad. If the plaintiff means to assert plainly that he has sold the land to the defendant, he should aver that distinctly in the usual manner as other traversable facts are averred, with proper circumstances of time and place, and not by way of parenthesis, "as by the said agreement he did," which agreement, when we come to see it, may or may not amount to a sale; and indeed it could, in the nature of things, be no more than a bargain, and not an effectual sale, which could only be by deed.

There is no doubt that, as the plaintiff sets out the agreement, he must shew that he has sold the land to the defendant, before he is in a condition to sue for his first payment.

The case cited, or *Wilkes v. Smith*, 10 M. & W. 355, which is quite in accordance with the former decisions, shews nothing to the contrary, though cited for that purpose by the plaintiff. "In consideration that the plaintiff would sell, &c., the defendant promised to pay 125*l.* down," does not mean immediately after making the agreement, but immediately on plaintiff selling the land.

It is not material what opinion may be formed of the other grounds of demurrer, if the declaration is held to be bad for this cause, which goes equally to all the breaches. But it is at present my opinion that "*good notes*" does not necessarily mean *good negotiable promissory notes*.

I read the words, "meaning in good negotiable promissory notes," not as words standing in the agreement, but as words used by the pleader, and intended to explain what is meant by the word "notes." It might be possible that the agreement may run thus: "to be paid in good notes, meaning in good negotiable promissory notes;" but if that were so, the plaintiff could and ought to have given us to understand that, by law, such words as "*good notes*" were by the said agreement declared "to mean good negotiable promissory notes," &c. Not having done this, we must look at the words as giving the pleader's meaning to the words "*good notes*;" and although we may hold that the words "*good notes*" mean "*good promissory notes*;" I can not say that we have authority to hold that they mean *negotiable promissory notes*.

It does not come within the definition of a promissory note, that it must be negotiable. That point was very elaborately discussed and was so decided, in *Coleman v. Cooke*, Willis, 393. It is common in cases of sales of goods by auction, that the buyers are expected to furnish (when credit is given) good *endorsed* notes, which of course means negotiable notes; but I observe in the auctioneer's notice it is often added, even in such cases, that the parties are to furnish such "notes, with good endorsers if *required*." But if we could say that, in a transaction of that kind, there was a well known general usage to give *endorsed* notes in all cases, whether it was or was not specified in the conditions

that the notes should be endorsed or should be negotiable, yet that would not authorize us in so enlarging or rather so *narrowing* the construction of the word, for that would be the effect when applied to a transaction respecting the sale of lands, for we could not say that there is any general understanding or usage, in regard to the notes to be given in the course of such a dealing.

For all we can tell, the defendant in the case may have tendered the note of a man worth thousands of pounds, and unquestionably good so far as security; but the plaintiff may have rejected it, not because it was not a good note, but because it was not negotiable.

We cannot say that the words "good note," on every occasion in which they are used, mean a negotiable note. The defendant might be able easily to obtain a friend of undoubted substance to give this note to the plaintiff for the 150*l.*, though he could not consent to make it negotiable, so that it might get into the hands of a stranger.

I think the declaration attaches a meaning which we cannot say belongs to the words, and that it is therefore bad as regards that breach, on the same principle that declarations in cases of libel or slander are held bad, when the innuendo extends the same unwarrantably.

As regards the becoming responsible to James Oswald, I do not see that the declaration is not sufficient in charging the breach of that undertaking, following as it does, the words of the agreement.

Upon the main point, I will add to what I have said, that *Forlidge v. Cole* is not in the least opposed to the construction I have put on this writing; for in this case, looking only at the declaration, no certain day is set for any thing to be done by the defendant; the first sum is to be paid down, the other two things spoken of, are to be done in a *reasonable time*, and until the time shall have come for making the first payment, it would be impossible that the time could have arrived for doing those things which were to be done *afterwards*.

Now as to the 125*l.*, the first sum, I consider the declaration puts it on no other footing than that if the defendant

had said to the plaintiff—if you will sell me your farm, I will pay you 125*l.* down (that being the whole consideration); and in that case I should hold that the plaintiff could not have claimed the money till he had transferred, or shewn himself ready and willing to transfer the land.

Then, holding that opinion, I think it equally clear and on the same ground, that, as the agreement is set out, the 125*l.* *to be paid down*, is to be paid at the time that the plaintiff transferred, or is ready to transfer, the land. It is to the period of time when that should be, that the word “*down*” refers, and not to the moment of signing this scrap of paper, not under seal, which could not bind the land. Then the other things were clearly to be done *afterwards and in a reasonable time*, that is, as soon after the plaintiff could claim and had received the 125*l.* as might be thought reasonable.

It is impossible, I think, to hold these agreements to be independent covenants; for the very words of defendant's undertaking are conditional, that is, “in consideration plaintiff will sell when defendant requests it.” I cannot assent to such a construction as holds those words to be an acknowledgment that the 125*l.* was due immediately, without any thing more being done by the plaintiff; and I am of opinion that defendant is entitled to judgment on the demurrer.

MACAULAY, J.—I do not think the tender of a conveyance, or offer to convey, formed a consideration precedent to the plaintiff's right to the 125*l.*, and 150*l.* in notes and to the defendant's obligation to assume responsibility to Oswald; or that such tender or offer should be necessarily averred in the declaration. The consideration for the defendant's promise is stated to be, that the plaintiff, at the request of the defendant, *would* (as by the said agreement he in fact *did*) sell to the defendant the Thorold House. According to this description of the agreement, it must have been worded to this effect—“in consideration that the plaintiff, at the request of the defendant, *will* sell, or hereby agrees to sell, and as by these presents he in fact does sell;” unless part of the clause be merely a parenthetical allegation, that is, the

words "as by the said agreement he in fact did," in which event it would read simply thus: "in consideration that the plaintiff at the request of the defendant, *will sell*, or hereby agrees to sell," &c., the defendant promised (or promises) to pay therefor 625*l.*, as follows, *viz.*, 125*l.* down, 150*l.* in good notes, to be delivered within a reasonable time after the making of the agreement (unless the latter words be matter of allegation and not of description), and within a reasonable time become responsible for 200*l.* to James Oswald, &c.

The cases of *Purdage v. Cole*, 1 Saund. 320, and cases cited in note 4, and more recently the cases of 10 A. & E. 50, *Matlock v. Kinglake*, and 10 M. & W. 355, *Wilkes v. Smith*, 6 Bing. N. S. *Sanson v. Rhodes*, 261, 12 Jur. 541, *Dickon v. Jackson*, shew that the terms of the agreement are independent. 125*l.* was to be *paid down*, and the rest of the consideration to be satisfied in a reasonable time after the making of the agreement, consequently, unless a conveyance, which was to be at the defendant's request, was to be made simultaneously with the agreement, part performance or payment on the defendant's part was necessarily to precede performance on the plaintiff's part, and, if so, mutual performance could not be reciprocally dependent acts.

I think the agreement being that the plaintiff, at the request of the defendant, would (or agreed to) sell, shews that it was a mere executory contract for a sale, to be perfected thereafter; and that the words "to be paid down" do not mean upon the plaintiff's executing a conveyance, but forthwith upon the execution of the agreement.—See *Gillett v. Whitmarsh*, 8 Q. B. 966. The periods appointed for satisfying the residue of the consideration, *viz.*, a reasonable time after the making of the said agreement and at certain times and in a certain manner in the said agreement stated and agreed upon, shews that the 125*l.*, parcel, &c., were to be paid down upon the making thereof. If so, the payment at different stated periods, and the conveyance, at the defendant's request without any period therefor being mentioned or specified, are consequently independent and not concurrent acts; nor is the conveyance a con-

dition precedent to the plaintiff's right to the respective payments. To give a different construction to the agreement seems to me quite inconsistent with *Purdage v. Cole*, 1 Sand. 420, and *Matlock v. Kinglake*, 10 A. & E. 50, and other cases, very much resembling the present.—See 2 N. Rep. 239; 3 Bing. N. S. 355; 6 M. C. W. 830, 835, . M. & W. 474, *Laird v. Pim*; 10 M. & W. 358, ante; 12 Jurist, 541; 6 Bing. N. S. 261, ante; 6 M. & W. 835, *Poole v. Hill*; 4 Q. B. 421, 840-1.

The word "sell," in the agreement, may be construed as meaning "to convey," though selling and delivering, selling and conveying, are often regarded as distinct acts. But admitting that the plaintiff agreed to sell or convey, at the defendant's request, still the consideration for the defendant's promise to pay, was the plaintiff's *undertaking* to sell, not the actual sale or conveyance; and the cases referred to, shew that where a day is appointed for payment of the money, or part of it, and the day is to happen, or may happen, before the thing which is the consideration of the money, is to be performed, an action may be brought for the money before performance; for it appeared the party relied on his remedy, and did not intend to make performance a condition precedent; and so it is when no time is fixed for the performance of that which is the condition for the money.—See 10 M. & W. 360; 10 A. & E. 50; 1 Sand. 320, note 4, No. 1. This rule or test appears to me directly applicable, for it is clear to me that the 125*l.* was to be paid *down*, upon the execution of the agreement, and not to be deferred till the plaintiff should at some future period convey the house, &c., at the defendant's request, and consequently such payment was to precede performance on the plaintiff's part.

The agreement does not say to be paid down, upon the execution of a conveyance of the land, whenever the defendant should request it, which he might not do for years; but it says to be paid down simply, which imports immediately, and that such is the meaning of the agreement is plainly shewn by the contract.

Readiness or offer to perform is only requisite to be

alleged when the acts are concurrent, as in the case of reciprocal covenants, constituting mutual conditions to be performed at the same time.—1 East. 203; 1 Chy. Plg. 310; Dig. 690.

If the plaintiff was bound to convey previously to or concurrently with his right to recover the 125*l.*, then, for the residue of the purchase, he must of course rely upon the defendant's undertaking alone, for payment in full, evidently is not to be made at one time, i.e., *down*. To require each to rely upon the undertaking of the other seems as reasonable, and at all events it appears to be the clear effect of the agreement, as stated in the declaration.

It is not averred that the plaintiff conveyed the Thorold House to the defendant, but it is alleged that he agreed, at the defendant's request, to sell it. Such an agreement is contained in the terms, "in consideration that the plaintiff would (or will) sell;" and also (if a descriptive allegation) in the words, "as by the said agreement the plaintiff did (or does) in fact sell." These words do not operate as a conveyance, nor do I think they import, by way of allegation, that the plaintiff had conveyed. Words of sale so used in an agreement, not under seal, in relation to real estate, constitute an agreement to sell, though ineffectual as a bargain and sale to pass the estate.—10 Jurist, 926, *Vaughan v. Hancock*; 10 M. & W. 355, *supra*; 12 Jurist, 541; the declarations are framed very much like the present.

At common law, a bargain and sale, even under seal, was only a contract (2 Jurist, 671; *Cornish on Uses*, 156), and did not transfer the legal estate. So here, the terms of this agreement amount only to a contract to convey, and not to a conveyance. Thus, if the words "as by the said agreement the plaintiff in fact did sell" are not descriptive of such agreement (as I, however, think they should be taken to be), but constitute an independent averment of the legal effect of such agreement, such averment is unwarranted and may be rejected as surplusage.—*Stephens' Plg.* 468–9, and cases cited in note b. It would not in this view be the assertion of a fact, but of a legal effect resulting from the agreement, which the court can see it could not have.—See 14 M. & W. 244–5, *Playfair v. Musgrave*.

The *date* of the agreement shews the time.

As to the construction of, and the meaning given to the word "notes." It is said, in *Millan v. May*, 13 M. & W. 511-7, that words in an agreement are to be construed according to their strict and primary acceptation, as that London means the city of London proper (see 12 Jurist, 155, *Simpson v. Margetson*); that month means lunar month (and see the cases there referred to). In 2 Camp. 532, *Hodgson v. Davies*, Lord Ellenborough held that it could not be proved that the word "bill," in a contract, meant "approved bill." 3 Cam. 176, *Boothby v. Lowden*, where the word "notes" is taken to mean "promissory notes;" and see 2 Cam. 283; 2 M. & S. 121; 1 Taunt. 526; 2 N. & M. 71. A promissory note or note of hand is defined to be a promise or engagement in writing to pay a specified sum, at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer.—*Byles on Bills, &c.*

Now on the face of this declaration the court may, I think, construe the words "good notes" to mean "good promissory notes;" but there is nothing shewn to limit their meaning to *negotiable* notes (which good notes need not necessarily be), any more than to designate the time for payment. The agreement, as stated, is very vague on this head, for it does not express whether defendant is to be a party to such notes or not, nor whether they were to be payable at a fixed day or on demand.

If therefore the words, "meaning in good negotiable promissory notes," are to be understood as by way of inuendo, or explanation, averring the meaning of the agreement in this particular, and not as descriptive of the contents of the agreement, it seems to me unwarranted. That it is matter of averment and not of description is, I think, shewn by comparing it with other parts of the declaration. The words, to be paid down, are alleged to mean immediately after making the said agreement, which they do mean, and the unnecessary explanation added thereto, is clearly by way of inuendo and not description. Thus, when James Oswald is mentioned, the declaration does not (as it does

of the notes) say Oswald, meaning James Oswald, but James Oswald, in the said agreement described and referred to as Mr. Oswald. It appears to me, therefore, that the words in question are not descriptive of the contents of the agreement, but are words of substantive averment or inuendo. It is one rule of pleading, that an agreement may be stated according to its legal effect.—*Liddell v. Monro*, 4 U. C. R. 475; 3 B. & A. 69; 1 B. & C. 16; 1 M. & G. 279, note (b.); 2 Sand. 97 (2); *Stephens' Plg.* 478; 1 M. & W. 8; 1 Vent. 109; *Carth.* 308. And according to this rule, if such be the legal meaning and effect of the agreement, the plaintiff should have averred that the defendant promised to pay the 150*l.* in good negotiable promissory notes, instead of describing it as containing the words "good notes" only, and then applying to them a meaning they do not necessarily bear, and which nothing in the context is shewn to warrant.

The cases in the books, upon the province and use of inuendoes, are principally actions of slander or libel (1 C. M. R. 61), and, I think, shew that wherever a meaning or force is to be given to particular words, contrary to their natural or legal import, the circumstances which warrant the allegation thereof should appear in the face of the declaration; and the distinction between the mere *meaning* of words, or construction of words, when the interpretation may be given by the way of inuendo, without inducement, and the *intention* with which such words are used, marks the difference. The inuendo is here added to the word "notes," to express either the *meaning* of the word or the *intention* of the parties in using it.—See *Wigram on Extrinsic Evidence*. The court can perceive that, as to the *meaning* of the word, it is inaccurate; and as expressive of the intention, as an independent fact, the context does not warrant it; so that in either light it is improperly introduced. It may be said, 1st, that the inuendo is (if well pleaded) admitted by the demurrer to be the true meaning, if the agreement is susceptible of that construction; or, 2ndly, if not, that it is but surplusage and may be rejected; or, 3rdly, at all events, that the breach is laid in such general terms that (rejecting

the inuendo) it denies the delivery of any promissory notes, negotiable or otherwise.

To the first, the answer is that it is not well pleaded, not, in short, admissible, in the manner and form in which it is pleaded, and that, so far as the declaration shews, the agreement is not susceptible to the meaning thereby ascribed to the word notes. To the second, that it is not surplusage, but the allegation of matter of fact, calculated to qualify and alter the legal import of the word notes. The Court does not see that under no circumstances could it be warranted, only that, so far as the declaration shews, it is inadmissible. If the agreement itself were set out in full, it might, on the face of it, shew matter not now appearing, sufficient to sanction it, or perhaps collateral matter might by way of inducement, be stated, to warrant and sustain it. At present, enough does not appear. To the third, the breach is certainly comprehensive enough, and on general demurrer would, I think, be sufficient; but it is at least equivocal in that part which negatives the payment in "*notes as aforesaid*," and the objection is made by special demurrer, not to the breach, but to the inuendo, which cannot be rejected as purely surplusage. If the inuendo could be disregarded, as it might perhaps on general demurrer, the breach would be sufficient; the difficulty is that it is excepted as *informal*, and the question is whether, on special demurrer, it can be treated as merely redundant or superfluous, and this I do not think it can.

It is not mere tautology, or amplification, or irrelevant matter superadded to what was sufficient before, but it is calculated and intended to impart a meaning to the word notes, enhancing the defendant's obligation, viz., to give good negotiable notes; whereas the contract, using the word notes only, might be satisfied by the delivery of good notes, though not negotiable. The object and design of the inuendo, as used, takes from it the character of mere surplusage. This it cannot, in my view of the subject. However, the objection only applies to one of three breaches; and if the declaration is otherwise good, the demurrer is too large, and, applied distributively, must be restricted to the 150%.

only.—1 Sand. 285 (b); 6 Q. B. 285; 10 M. & W. 731; 13 M. & W. 761; 1 M. & G. 201 (n).

The responsibility to be incurred to Oswald is manifestly the assumption of the debt by the defendant, so as to exonerate and discharge the plaintiff therefrom; and this I think, appears with sufficient certainty.—9 Irish Law Rep. 835.

I am of opinion, therefore, that judgment should be given in favour of the defendant upon so much of the demurrer as relates to the second breach, and for the plaintiff as respects the first and third breaches.

SULLIVAN, J.—The plaintiff declares that the defendant, for and in consideration that the plaintiff, at the request of the defendant, would, as by the said agreement the plaintiff did in fact, “sell,” the defendant undertook, as in the declaration mentioned.

In the case of *Wilkes v. Smith*, 10 M. & W. 359, Baron Parke takes the distinction between undertaking to sell and an actual sale, which latter term he uses as having the same meaning as a conveyance; and as the word sell supposes a change of property, perhaps that meaning must in this case be given to the word. We are, however, familiar with what are called sales of land, entirely separate from and preceding the conveyance, as sales of land by auction, sale of land by the Sheriff, and sales of land for taxes, in all of which cases an agreement or undertaking to convey, and not an actual conveyance, are intended.

When a bargain is made for the purchase of land, the price to be paid in future, the conveyance may be to be made at once, or it may await the payment of the price, according to the expressed intention of the parties. If nothing is said as to the time of the conveyance, that is not to be made until the price is paid, and in such a case, in an action for the purchase money, it is not necessary in alleging a breach to preface it with an averment of the plaintiff's title or readiness to convey; but if the whole price has to be paid down, the plaintiff must shew his readiness to perform the concurrent act of the conveyance, or if it appears from the contract that the time of the conveyance was precedent to the time of payment, an actual conveyance should be averred.

The intention of the parties to an agreement has to be gathered from the words they make use of. The plaintiff describes himself as having agreed to sell land, at the request of the defendant. In consideration, he says that he would, at the request of the defendant, sell. This means, I think, that he would, at the request of the defendant, convey. The defendant would not be in a condition to make such a request until he was ready with the money and securities stipulated to be provided at once; and, on the other hand, the plaintiff is not competent to demand them, or to charge the defendant with a breach of his contract, until he shews that he is ready and willing to make the conveyance, or that he has made it; and as to payments to be made by the defendant in future, the plaintiff would have to trust to the contract.

Now, taking this to be the meaning of the contract, as the plaintiff has undertaken to describe it, his allegation that he did in fact sell by the agreement, is not sufficient, for no conveyance of land could be made by such an agreement as he shews; and, as he has not averred a readiness and willingness to convey at the request of the defendant, I think his declaration must fail;

I do not mean to say that the agreement, which, having been produced at the trial of the issues in this case, I have had an opportunity of seeing, will not bear another construction. I can now only look to the contract set out in the declaration.

With regard to the inuendo introduced into one of the breaches, which narrows the meaning of the words good notes to good negotiable notes, I was at first of opinion that it must be taken as descriptive of the agreement, and as meaning to allege that the narrowest meaning was given to the words by the parties, expressly by the written contract; in that case the inuendo could not be rejected; and if the plaintiff failed at the trial to produce such an agreement as would warrant the inuendo, he should have been non-suited. But after much consideration and endeavor to apply analogies taken from cases of slander and libel, as to the offer and effect of inuendoes, it appears to me that this one must

be rejected as altogether unsupported and surplusage. It does not give a meaning to words which are doubtful in themselves, or which require or bear explanation, but, on the contrary, it professes to give a meaning to words, well understood and plain in themselves, different from their ordinary acceptation. I think, therefore, on the authority of the cases following, that the inuendo should be rejected. —Roberts v. Camden, 9 E. 95; Hall v. Blandy, 1 Y. & J. 480; Clegg v. Laffer, 10 Bing. 250; Harvey v. French, 2 Tyr. 385; Williams v. Stott, 3 Tyr. 688; Wheeler v. Haynes, 1 Per. & D. 55; Gardner v. Williams, 6 Tyr. 757; Day v. Robinson, 4 N. & M. 884.

McLEAN, J., concurred in opinion with the Chief Justice and Mr. Justice Sullivan.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Judgment for defendant on demurrer.

MACAULAY, J., *dissentiente*.

DOE DEM. JEFFREY v. WILLIAMS.

Demand of possession—Particularity required therein, in pointing the defendant to the precise parcel of land the plaintiff is seeking to recover.

Declaration in ejectment. Demise laid the 1st January, 1844. Ouster the same day. The premises were stated to be 10 messuages, 10 cottages, 10 barns, 10 stables, 10 coach-houses, 10 out-houses, 10 yards, 10 gardens, 10 orchards, 300 acres arable land, 300 acres meadow land, 300 acres pasture land, 300 acres wood land, and 300 acres of land covered with water, 300 acres of other land, with the appurtenances, in the township of Vaughan.

In the consent rule, the defendant defended for the premises in question, which premises he thereby admitted to be or consist of the premises in the declaration in this cause, for which he defended as tenant.

Lease, entry, ouster and possession were admitted.

It appeared in evidence that the lessor of the plaintiff owned the south half of lot No. 5, in the 8th concession of

Vaughan ; and the defendant, that part of lot No. 4, in the said concession, adjoining the plaintiff's on the south. That the concession road in front of the concession had not been opened, but that a road had been made through the lots, cutting them in two, by which the owners had settled ; but the points of intersection being throughout disputed, the owners of the first five lots agreed that Mr. Dennison, a deputy provincial surveyor, should run the line, and which he accordingly did. The effect of his survey was that the side line between the plaintiff and defendant was too far north, and the defendant consequently was in possession of part of the plaintiff's lot.

Afterwards, that is, on the 29th June, 1846, they signed a written memorandum, whereby the defendant admitted that the plaintiff had good title to all the lands north of Mr. Dennison's line, which he thereby acknowledged to be the correct boundary line between the lots Nos. 4 and 5, and that all No. 5 belonged to the lessor of plaintiff.

The lessor of plaintiff agreed that defendant should have peaceable possession of that part of lot No. 5, on which he had crops sown, until they were taken off.

Mr. Dennison, being called by the lessor of the plaintiff stated that after this action had been brought, and after the defendant had moved his fence from the old line to the true one, he (defendant) requested the witness to examine the fence to see whether it was on the correct line ; that the defendant took him to the line on the west side of the road, crossing the lots, and pointed to the west, in which direction the fence seemed on the true line. The defendant acted as if he thought the action was brought for some land on the west side of the road, where all seemed right. He told the witness to examine it all through, and the latter said that, looking eastwardly from the road, the fence appeared correctly placed on the upland on that side also ; but that, from where he stood, he could not see where it crossed the creek, which, owing to the elevation of the ground, was not visible. When the witness expressed his surprise to the defendant that an action had been brought, as the fence seemed right on both sides of the road, the

defendant said there was a shall piece at the creek, and a log across, but that he did not think it could be for that.

This witness was afterwards employed by the lessor of the plaintiff, and made a plan, shewing the point of dispute. He stated that the fence was all correct, except at the creek, where an old stick of timber, crossed it in the old line, remained, and the fence on the new line was connected with it on the one side by two panels of fence and on the other by one. The portion of No. 5, so left within the defendant's fence or inclosure, and for which this action is brought, being about 16 feet by 40, principally the bed of a small creek running through the lot, of little value. The bank of the creek about four feet high.

The plaintiff further proved that, on the 8th November, 1847, he caused a notice to be served on the defendant, as follows: "I hereby give you 30 days' further notice to set your fence, between your lot and mine, honestly on the line; otherwise leave sufficient for a lane." Also that the plaintiff's lessor had a lane immediately within or north of the new fence, on the east and west of the creek, but not quite up to it on either side.

Mr. Dennison produced a plan of the ground at the trial, exhibiting everything very clearly. Another notice, not forthcoming, had also been served on defendant, but it did not seem material. It was proved that, after being served, the defendant had shewn both notices to one of the plaintiff's witnesses.

For the defendant, it was objected that there was no case for the jury; that the defendant was entitled to a demand of possession, but none had been proved, and that there was no proof that the defendant had fenced in that part of the creek in question. These objections were overruled, and it was held that there was a case for the jury.

The defendant then went into evidence to show that, by concert with the plaintiff's lessor, the fence was moved soon after the date of the written agreement on that head. That it was arranged between them that the defendant should furnish rails, and the plaintiff's lessor lay the foundation rails—a precaution of the defendant's to prevent future disputes about their being in the true line. That the

lessor of plaintiff said he could not attend himself, but would send his son. The witnesses for the defendant represented that the son attended accordingly, and assisted in putting up the new fence; that when they came to the creek, the plaintiff's son, upon some remarks being made about it by the defendant, or one of his workmen, said it would be a great deal of trouble to move the log that crossed the creek, that he thought it would be no matter, being a small piece, and they laid the fence up to it, instead of moving it. It is at present just as they left it; and what was called a swing gate is hung under this log, to close the space down to the water level. This gate was hung by the plaintiff's son. This son laid the bottom rails, and had he insisted upon, or required it, the defendant's witnesses said they supposed the fence would have been continued directly across the creek; that they had plenty of rails, but not a sufficient log for a bridge, without getting one. The log on the old line rested on an abutment in the east side of the creek, which supported it. The crossing was equally eligible in a direct line, only it would have been some trouble to have moved the log, or got another and laid it.

In reply the son of the lessor of the plaintiff was called, and said he attended, owing to a message he had received, but, as he supposed, merely to assist in removing the fence, and not to lay the bottom rails more than any other, though he did lay most of them. He could not say whether he laid those in dispute, being only three panels, that is, two on the west side and one on the east of the creek. He said the defendant first proposed to fence up to the log or abutment, on the east side; and that he replied he thought it would not be disputed for the present, for the time. He also said that he had no authority to compromise the lessor of the plaintiff in the matter. That it was not the plaintiff who sent him, but he attended upon a message from him, left at his residence by a third person. He said the old log was the plaintiff's. This witness represented that he intended setting up the new fence under the defendant's direction, as being owner of the rails, and the witness having received no particular instructions.

The jury were told that the defendant admitted possession of the premises, and that, if part of lot No. 5, the plaintiff was entitled to recover, unless the defendant, on the 1st January, 1848, was in possession, with the assent of the plaintiff's lessor, and his will remained undetermined when the action was brought. That there was some evidence of a notice since the removal of the fence, apparently in order to determine any assent that might be supposed to exist owing to anything his son had done. It was left to the jury, on the point of the lessor of the plaintiff's assent continuing unrevoked on the day of the demise, of which the court held there was sufficient evidence, if any such assent could be inferred.

The defendant's counsel objected to the charge, contending that the jury should be told a demand of possession was necessary, and that no such demand had been proved. The court ruled there was sufficient evidence to go to the jury of the determination of any will, if any could be supposed to have existed.

The case was tried before Macaulay, J., at the Home District autumn assizes, 1848, but the verdict was rendered before Mr. Justice Sullivan.

Gamble moved for a new trial, on the ground of misdirection, the reception of improper evidence, and on affidavits, and on the evidence. *Ewart* shewed cause.

The authorities cited were—2 T. R. 283; 2 Bl. H. 803; 1 N. Rep. 329; 2 Chits. Rep. 268; 1 Burr. 54; 2 Burr. 664; 1 M. & R. 173; Comyn. Dig. Estate H., 6-9.

ROBINSON, C. J.—There is no doubt, I think, from the report of this case by the learned judge who tried it, and by what occurred when Mr. Justice Sullivan, in his absence, received the verdict, that the jury desired to be understood as not considering that the defendant had received a proper or sufficient notice, or demand of possession, if any such were necessary, before bringing the action. And I think they were right in so viewing the case. It is one of great apparent hardship on the defendant. He and the plaintiff owned contiguous lands, had been in dispute about the boundary, and afterwards procured a survey to

be made by amicable agreement, and laid the division fence accordingly ; but, by assent of the defendant and the plaintiff's son, who had been sent to act for the plaintiff, in helping to move the fence, two or three panels of the said fence, at a point where it crossed a small stream, were laid out of the right line a few feet, in order to take advantage of the convenience of some fallen tree, which afforded some support to the fence in the soft ground and gave to both parties facilities for crossing the brook. Although the brook at this point was an encroachment on the plaintiff's land, yet it was the mutual act of the parties, done for mutual convenience, and before defendant could be treated as a trespasser for leaving the fence where both had placed it: it required that he should have been given unequivocally to understand that the plaintiff wished the fence to be straightened along those few feet of the line. The plaintiff, instead of pointing that act distinctly as being what he wished, made a written demand on the defendant, which seems naturally to have led the latter to understand that the plaintiff was returning to the old dispute, and intending to open the question about the line generally. This inquiry of the plaintiff's attorney confirmed that, for the latter answered that he supposed it was the old dispute ; and he candidly avowed, on the argument before us, that if he had any idea that his client was bringing his action on account of the alleged crook in two or three panels of fence, he would not have gone on with it.

The defendant employed a surveyor to re-examine the line, and finding the fence on the right line, as he was assured, defended the action ; and at the trial he found, to his surprise, that the plaintiff did not endeavour to raise any dispute about the correctness of the line, but asked for his verdict only on account of about 16 feet wide of wet land, where the small crook was made at the creek. This was a claim which there could be no ground for opposing, and which no man in his senses would have stood an action about. What defendant did allow himself to be put to the cost of a defence is said to be his own fault, for that he might have specified in the consent rule what he defended for ; and so

no doubt he might, but believing, and I think reasonably under the facts, that the plaintiff was claiming the line to be altogether wrong, and not merely in this small jag, about which there could be no dispute, he naturally defended for what he meant to maintain.

A notice, to avail a party, should be such as not to mislead. The plaintiff should, before bringing an action for these few feet of wet ground, have asked to have the fence straightened there, or might have made it straight himself, for he well knew his neighbour did not claim a right to that land. The defendant was not a trespasser till he had shewn that he persisted in retaining the small jag in the fence as it was, after his neighbour, who had helped him to lay it there, demanded to have it made straight. And this desire was not, I think, conveyed in such a manner as to make the defendant aware of the intention and object.

Considering the facts of the case, and the evident impression and intention of the jury at the time of delivering their verdict, I think there should be a new trial, either with or without costs, to abide the event; for it was necessary at the trial that the plaintiff should prove the defendant a trespasser, in respect of the particular land for which he sought to recover, and the plaintiff limiting his claim to the little angle in question, and the defendant's occupation of that having been assented to by the plaintiff, it became necessary to satisfy the jury that the permission had been unequivocally withdrawn, by such a notice as it was proper and reasonable the plaintiff should give under the circumstances.

The jury, when they came in with the verdict, expressly declared that if the notice or demand was necessary, they did not find that such had been given.

It has been remarked that the plaintiff's declaration and the consent rule are both in the most general terms, merely for so many acres of the township, describing no lot in particular, and therefore that all the plaintiff had to do at the trial was to shew title to any land in the township and he must recover.

No doubt that is so. But on the other hand, as it would be of little service to a plaintiff to prove title to land which

he was already in possession of, and which nobody pretended any right to; for his writ of *hab. fac.* must be governed by the evidence; so in point of fact, the plaintiff in this case did not act so absurdly, but he limited his claim to the small angle spoken of, and only sought to recover in respect of that.

The defendant was therefore properly in a position to set up want of proper notice, and to raise the question, which has been taken. The jury, it is clear, were with him, and found in effect a verdict against the plaintiff. Whatever may be the event of another trial, I think the verdict, given as it was, ought not to stand as a verdict for the plaintiff.

MACAULAY, J.—In this case the plaintiff declared generally, for divers lands. The defendant does not specify in the consent rule what he defends for, but defends generally for the whole. The defendant ought to have particularised according to the rule of court, and might have obtained particulars if ignorant of the intent and meaning of the service of declaration, which we must presume to have been sworn to in the affidavit of service; or he might have suffered judgment by default. Instead of which he defends the suit; and when the plaintiff proves title, his defence is, that he did not know for what the ejectment was brought. The evidence shews that up to a certain day he had the sanction of plaintiff's lessor to possess up to the old fence, and that after that day he had not. In the interim the fence was moved; and what the plaintiff's son said and did is taken as evidence of a prolonged assent as to the small tract in question; and the jury seem to have been of opinion that under the circumstances the plaintiff was bound to determine his will by a sufficient notice or demand of possession, referring it to the court whether the writing served was sufficient.

In the first place, I am not satisfied the defendant held otherwise than at sufferance—in other words, I am not satisfied that what the son said and did amounted to a binding assent on the lessor of the plaintiff, as being his agent; and if it did, it seems to me the only reasonable and just inference that the defendant had notice afterwards of

its determination, and that such notice was sufficient of itself, exclusive of the other evidence, calculated to prove that defendant knew what it particularly referred to. It notified the defendant to put his fence honestly in the true line or allow a lane. He knew he had placed it in the true line except at the creek, and he knew that at the creek it had not been done. He knew, therefore, that whatever the plaintiff might have meant there was one particular in which it behooved him to comply with it—yet he did not do so, or suffer judgment by default, or defend exclusively for that parcel, or for all on his side of the fence, excluding it; but he defends generally, including it and all else the plaintiff may prove title to—for he was bound to admit possession. This notice intimated that so far as the defendant was possessed beyond the true line the plaintiff charged that the fence should be altered. He was possessed beyond the true line of the creek, and had therefore notice to withdraw. The other evidence tends to shew that defendant must have known the object of this notice; and I cannot say I see any good reason for disturbing the verdict, which I think right on the evidence.

McLEAN, J., and DRAPER, J., concurred in granting a new trial. Costs to abide the event.

Per Cur.—New trial granted.

MACAULAY, J., *dissentiente*.

FINKLE ET AL. V. ARNOLD.

Pleadings. To an action of debt on bond for the non-performance of an award, the defendant pleaded seven different pleas (which appear below), all setting up various objections to the validity of the award—the court held upon demurrer, all the pleas bad.

The plaintiff sued on a bond; the defendant in oyer sets out the condition, which was, that the defendant should abide by and perform the award of George W. Whitehead and John Renards, and such other person as they might appoint, or any two of them, so that the said award be made in writing under their hands and seals, and ready to be delivered to the said parties in difference, on or before the fifteenth day of January (then) next."

The defendant pleaded as his second plea, that "*the said arbitrators, in the said condition mentioned, did not make the said award in writing, under their hands and seals, and ready to be delivered to the said parties, as in the said condition mentioned, on or before the said 15th day of January, in the said condition mentioned.*"

3rd plea—That neither the said arbitrator nor the said plaintiffs did or would, although thereto requested, on or before the said 15th day of January, in the said condition of the said writing obligatory mentioned, deliver, or cause to be belivered, to the said defendant, the said award, or any copy or statement of the effect and substance thereof, as in the said condition mentioned, in manner, &c.

4th plea—That the award, in the said condition mentioned, awarded that the said Turpin H. Arnold, his executors or administrators, should, on the first day of the month of March next ensuing the date of the said award, between the hours of ten and twelve of the same day, at the store of Henry Finkle, in Woodstock, pay, or cause to be paid, to Henry Finkle and John Finkle, the sum of 23*l.* 17*s.*, together with legal interest thereon, in full of damages and costs in a certain action then lately commenced by them against the said Turpin H. Arnold, for the claims and costs of and occasioned by the said reference, and upon payment of the said sum of 23*l.* 17*s.* did award and direct that the said parties should duly execute and deliver to each other mutual releases in writing of all and every action and actions, cause and causes of actions, damages, claims and demands whatsoever, subsisting and depending between the said parties, and before the said first day of March. And the defendant further saith that the said award is uncertain and insufficient in not stating how much interest the defendant was to pay on the said sum of 23*l.* 17*s.*, nor from what time, nor until what time the same was to be so paid, &c.

5th plea—That the award, in the said condition mentioned, awarded that the said Turpin H. Arnolds, his executors or administrators, should, on the first day of the month of March next insuing the date of the said award, between the hours of ten and twelve o'clock of the forenoon of the

same day, at the store of Henry Finkle, in Woodstock, pay or cause to be paid to Henry Finkle, the sum of 23*l.* 17*s.* lawful money of the Province of Canada, together with legal interest thereon, in full of damages and costs in a certain action then lately commenced by them, against the said Turpin H. Arnold, for the claims and costs of and occasioned by the said reference, and upon payment of the said sum of 23*l.* 17*s.* did award and direct that the said parties should duly execute and deliver to each other mutual releases in writing of all and every action and actions, cause and causes of action, damages, claims and demands whatever, subsisting and depending between the said parties, and before the said first day of March. And the defendant further saith, that the award is uncertain and insufficient in not stating how much of the said sum of 23*l.* 17*s.* were to be paid for damages in the said action, or how much for costs, or how much for the claims and costs of, and occasioned by the said reference, &c.

6th plea—That no such suit for the claims and costs of any reference, as in the said award is mentioned, was ever pending, nor was it a matter of dispute between the said parties at the time of the said submission—and this the defendant is ready to verify, &c.

7th plea—That the said arbitrators did not award on all matters in difference between the said parties, but that a large quantity of axes, before then in dispute, in a certain suit between the said Henry Finkle and John Finkle, plaintiffs, and the said defendant, as defendant, was not awarded upon—and the said arbitrators refused to award upon the same, &c.

Demurrer to 2nd plea—Because it is alleged that the said arbitrators, in the said condition mentioned, did not make the said award in writing, whereas an award made by any two of the arbitrators, in said condition mentioned, would have been sufficient under said condition.

To 3rd plea—Because the said plea contains no legal answer or defence to this action—nor does it shew how or when the arbitrators were required to arbitrate upon this action, nor does it shew how or when the arbitrators were

required to deliver their award, or a copy thereof to the defendant, and because for all that in that plea is shewn, the same may have been requested before the same was made or ready, and before the last day allowed for making the same; and because it is not averred that any two of said arbitrators did not deliver the said award, and also that said award was only to be delivered to the said parties in difference, or to either of them.

To 4th plea—Because the matters set forth in said plea, even if true, are no defence to this action, because said plea does not traverse or confess, and avoid the declaration; and that the same seeks, by way of plea, and concluding with a verification, to state objections to said award, which being intrinsic, should be set up by way of demurrer, and said plea seeks to put in issue to the country matters of law, and that no certain or proper issue can be taken thereon, and said plea should set forth said award before objecting thereto.

To 5th plea—Same as 4th.

To 6th plea—Because the matters in said plea alleged disclose defence, or answer to the suit of the plaintiffs—that said plea seeks to raise an immaterial, irrelevant and insensible issue—and said plea without setting forth said award, does not in any way shew to the court, whether said award does contain any statement, or recital of any suit, as in said plea mentioned, or how the matters contained in said plea can in any way avail in defendant's defence, or how the non-existence of any such suit can affect said award, and that said plea, if intended to traverse any allegations of the plaintiffs, should conclude to the country, and that no material or certain issue can be taken on said plea.

To 7th plea—Because the said plea does not allege that the matters which it states were not awarded upon, were in any way brought under the notice of the arbitrators, or that they were in any way requested or required to arbitrate thereon, or when or how the said arbitrators refused to award upon the same; and for all in said plea alleged, any two of said arbitrators may have awarded upon said matters and may not have refused to award upon the same, and that said plea does not set forth said award so as to enable

the court to see if said matters are or are not awarded upon—nor does said plea shew that any award was made—nor does said plea shew how it was material to the settling of all differences between the parties, that the large quantity of axes in said plea mentioned, should have been awarded upon, or how said axes were in difference, or could affect the finding of said award.

Hagarty, for the demurrer. *Eccles & Hawke*, contra—The authorities cited were—Watson on Awards, 299, 110, 111, 449; 16 Ea. R. 58; 1 Saund. 194; 2 Saund. 184.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiffs sued on a bond; the defendant in oyer set out the condition, which was, "that the defendant should abide by and perform the award of George W. Whitehead and John Renards, and such other person as they might appoint, or any two of them, so that the said award be made in writing, under their hands and seals, and ready to be delivered to the said parties in difference, on or before the fifteenth day of January (then) next."

The defendant pleaded as his second plea, "that *the said arbitrators, in the said condition mentioned*, did not make *the said award* in writing, under their hands and seals, and ready to be delivered to the said parties, as in the said condition mentioned, on or before the said fifteenth day of January, in the said condition mentioned, in manner and form as in the said condition mentioned.

The pleadings in *Skinner v. Andrews*, 1 Saunders, 164, seem to support this plea against the objection taken—that it does not deny that "*any two of the arbitrators*" made an award, but the plea I think is clearly bad, on several grounds; it speaks of the *said award* when no award had before been stated by either party to have been made, and seems to admit that an award was made, but not made according to the submission, either not being under seal, or not ready to be delivered, or not made in time. It is repugnant to plead as a defence, that the arbitrators did not make the said award before the 15th of January, when it had been nowhere asserted that any award had been made.

The plea should have been, that they did not make any award on or before, &c. Then again, the plea says that the said arbitrators, in the *said condition mentioned*, did not make an award; now the only arbitrators *mentioned* in the condition set out are Whitehead and Renard, and it is not necessary that *they* should have made the award, for they were first to appoint a third, and then any two of those might make an award—though either of the two mentioned in the condition should assent—2 Saund. 184; 3 Chitty's Pleading, 190.

The 3rd plea is, "that neither the said arbitrators nor the said plaintiff, did or would, although requested on or before the said 15th January, deliver or cause to be delivered to the defendant *the said award*, or any copy or statement of the effect and substance thereof, as in the said condition mentioned."

This plea is bad; the arbitrators had the whole of the 15th January to make their award in; therefore requesting them, on or before that day to communicate their award, would be idle; the request, to make it good, should be after that day, and should have been laid with averment of a particular time.

I refer to 1 Saunders, 327 (a), note 3. It is only matter of defence when properly pleaded by the defendant. The declaration does not aver any delivery of the award, and need not.

The 4th & 5th pleas are manifestly bad, they both speak of the *said award*, and impute certain defects to it where no award had yet been averred as being in existence. If there has been an award made, the defendant should have set it forth, expressly stating that such an award was made, &c.; then the defendant having shewn an award made and set it out, should have demurred, if he meant to contend that the award was illegal; instead of which he pleads the illegality, and tenders an issue of fact upon legal exceptions, which a jury are not competent to dispose of; in addition to which, in the 4th plea, he complains of that being uncertain, which is really not uncertain.

The 6th plea is clearly bad; for without stating as a fact

that an award was made, and without setting any award out, it begins by saying: "that *no such suit* for the claims and costs of any reference, *as in the said award* is mentioned, was ever pending, nor was a matter of dispute, between the parties at the time of the dispute, &c. The record contains no statement of any award whatever, and how could a jury be sworn to try whether *such* a suit, *as in the said award* was mentioned, was pending or not, when nothing had before been said of any suit or of any award?"

The 7th plea is also bad, for without setting out that any award whatever was made upon any matter, it avers as matter of defence, "that the arbitrators did not award on all matters in difference, but that a large quantity of axes before then in dispute in a certain suit, between the said plaintiffs and defendant, was not awarded upon, and that the said arbitrators refused to award upon the same."

If any defence of the kind existed, the defendant could only avail himself of it by setting out the award made, and then shewing which party it was that had a claim of the kind mentioned upon the other—a request by the defendant that the arbitrators should decide upon it, laying the request with proper averment of time, and then averring the refusal of the arbitrators to dispose of it.

Per Cur.—Judgment for plaintiffs
on demurrer to all the pleas.

BLUE V. GAS & WATER COMPANY.

Corporation—assumpsit—when corporation must contract under seal.

Held per Cur.—That an action of assumpsit would well lie against the Gas Light and Water Company of the city of Toronto, for damages in not fulfilling a *parol* agreement with the defendant, for the supply of water to the Toronto Baths.

ROBINSON, J. C., *dissentiente*.

This action was brought in assumpsit for the recovery of damages from the defendant, for not fulfilling a special contract for the supply of water to the Toronto Baths, which were kept by the plaintiff.

The declarations contained four counts, in none of which did it appear that the agreement was in writing or under seal.

Demurrer to declaration :—1st, because the agreement, in each of the counts mentioned, ought to be under seal—and it is not so shewn; 2ndly, because the defendant being a corporation, could not make the said agreement except under their corporate seal.

Cameron, Q. C., for the demurrer. *Phillpotts*, contra. The authorities cited were—8 Q. B. R. 326; 4 C. & P. 111; 3 B. & A. 125; 1 Camp. 466; 2 Saund. 302; 1 A. & E. 526; 10 A. & E. 210; 6 C. & P. 608; 1 Saund. 305; 2 New cases, 156; 4 B. & C. 962; 5 A. & E. 526, N. S.; 5 M. & Gr. 131; Smith on Contracts, 239.

ROBINSON, C. J.—I am of opinion that the authorities, by which we are bound, do not warrant us in holding that assumpsit will lie against a corporation on an agreement so special in its nature, and so considerable in regard to its object as that set out here.

The case of *Church v. The Imperial Gas Light Co.*, 6 Ad. & Ell. 846, is, perhaps, the strongest case that can be cited in support of this action; but that decision does not go the length of sustaining it, and it is in part founded upon a repudiation of any distinction, between executed and executory contracts as bearing upon the question, a distinction recognized and established by so many cases both before and after that decision, that I cannot feel myself at liberty to reject it.

It is, besides, a distinction in itself highly reasonable, I think, and founded on good sense. It would be absurd to allow a corporation, any more than an individual, to receive and use the goods of another, or to enjoy the benefit of his labour, and then to say, “you must prove that I promised to pay you.” The law dispenses, in such a case, with an actual promise—it implies it from the very nature of the transaction; and if the corporation or the individual were proved never to have promised to pay, but to have always resisted the demand, still the promise would be nevertheless raised by law.

But where a corporation or an individual is sued for not delivering or not accepting goods, there is nothing to raise an obligation to do the one or the other till an express agree-

ment is shewn, for that alone creates the liability, and there is nothing in such case to connect the defendant with the subject matter of the action till a legal contract is shewn.

The agreement which the defendants here are charged with entering into, is not one in the ordinary course, though it does, to be sure, relate to the company's ordinary business of supplying water. In the case just cited of *Church v. The Imperial Gas Light Company*, the court did mainly rest their decision on the acknowledged principle, that acts of such ordinary occurrence as to be of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal to every such act, may be done without that formality.

This principle is among those enumerated in *East London Water Works v. Bailey*, 4 Bing. 284—it is no modern innovation, but has the oldest and highest authority to support it; and it was much safer ground to rest upon than the rejection of the distinction between executed and executory contracts.

Then it is urged that if we admit the decision in the *Church v. The Imperial Gas Light Company* to be binding upon us, it must follow that we should hold the defendants capable of binding themselves by parol to such an agreement as that sued upon here.

I cannot concur in that, for this agreement is special—out of the ordinary course—not like the supply of one or two lights, or of water to a common dwelling at what we may assume to be a regulated rate of charge, and requiring nothing special to be considered and stipulated for or guarded against. The water was to be supplied for a bath-house—the defendants were alleged to have stipulated that they should not be required to furnish more than 2,400 baths in a year, and if more should be required, they were to have 4*d.* a puncheon for all after 2,400 baths had been supplied. It is true that it may be difficult to draw a precise line between what shall be regarded as ordinary commonplace trifling matters, and what shall be limited as special; but that courts are expected to draw the line somewhere, and that they have authority to judge of the circumstances,

is too plain to be disputed : otherwise there could be no such principle or exception as we are now discussing, but there is that principle, and it has been and is continually recognized and acted upon.

I have no difficulty in saying that the agreement sued on here is one special in its nature—requiring certain terms to be considered, and settled with a view to particular facts out of the common routine of the defendants' business. I cannot call this contract one in the ordinary course of their business, merely because it is for the supply of water: otherwise I should have to hold that an agreement to supply all the inhabitants of a particular quarter of the town, or to supply all the water which might be required for the City Market, would not be an agreement out of the general course.

If the legislature should choose to relieve us by a change in the law, from considering those distinctions, by dispensing with the use of the corporate seal in any contract of a personal nature, we could have no objection; but as the law stands (the Mayor of Ludlow v. Charlton, 6 M. & S. 814), I do not feel warranted in going the length that would be necessary to sustain this action as it is laid.

As to its not being evident to the court whether the plaintiff is suing on a deed or not, we cannot, I think, hold this to be an action of covenant, which it ought to be if the contract is one that could only be binding when made under the corporate seal. If this declaration had concluded, "and so the defendants have not kept their said covenant," I have no doubt the plaintiff could have demurred, because there had been no covenant set up; again, if the defendants had pleaded *non est factum*, I conceive their plea would have been demurrable, for we must clearly see that this declaration sets out no agreement under seal—5 M. & Gr. 133.

MACAULAY, J.—The demurrer, which is general, admits the agreement declared upon, if binding in law on the face of the declaration, and the defendant in so demurring relies upon its invalidity, on the ground that it does not appear to have been under seal, but as stated must be intended to be a

simple contract; it is not stated to have been under the seal of the defendants, nor does it appear that it was not under seal; wherefore the objection must be that the declaration is bad not because it appears to be a simple contract, but because the declaration does not allege the agreement to have been under seal.

In 16 East. 6, *Yarborough et al. v. The Bank of England* in trover against a corporation, a sealed authority to the party immediately guilty of the conversion, if necessary, will be presumed after verdict for the plaintiff.

Tilson et al. v. The town of Warwick Gas Light Company, 7 D. & R. 376; 4 B. & C. 962—debt for work and labour and other common counts, and with special counts; on general demurrer, it was contended that all the common counts were founded on simple contract, to which it was answered, that the neglect to set fourth the deed was mere matter of form, of which opinion was the court.

2 Sand. 305, a (13) necessary circumstances implied by law in a plea need not be expressed, as that a sheriff's warrant was under seal—*Cro. Eliz.* 53; 4 B. & C. 525-7, *Price v. Seaman*; 1 Bing. N. S. 633; *Burnett v. Glossopp*.

The Fishmongers' Co. v. Robertson et al., 5 M. & G. 152. The plaintiffs brought an action of assumpsit founded on an agreement, which, on the face of the declaration was alleged to be *an agreement in writing*. The defendants among other things pleaded that it was not under the seal of the plaintiff's. Special replication, rejoinder and demurrer, at page 172, *per Maule J.*, referring to prior cases, decided on the plea of non-assumpsit, said, that in this case, the plea was that there was no agreement; the declaration states an agreement, and if the plaintiffs could not agree except by deed, that allegation in the declaration may be held on general demurrer, to mean that the plaintiffs promised under seal, &c. *Tindal, C. J.*, however, remarked that it would appear upon the whole record in that case, that the promise was made by simple contract: so also at p. 191, in delivering the judgment of the court, he said that from the statement of the contract itself on the face of the declaration, &c., it might be inferred that the common seal of the plaintiffs

was never affixed thereto; further, that a corporation by bringing an action on a simple contract, still executory on their part, would be stopped by the record from afterwards objecting, in a cross action, that it was not sealed with the common seal.

Now, in the case before us, the declaration contains four special counts and no other, and there is nothing on the face of it to shew expressly that the agreement is by simple contract and not under seal: consistently with all that is stated it may have been executed under the defendants' common seal, and the contrary does not clearly appear, as in the case lastly above mentioned.

It is not precisely like the case in 4 B. & C. 962, or indeed any of those cited above; but if upon a plea denying the agreement alleged *modo et forma*, the plaintiff would be bound to prove a sealed agreement, it seems to follow that the general demurrer admits it; for, till the contrary appear, the presumption must be that there was a valid agreement, not that it was invalid—that it is (if necessary) under seal, not that it is not; a plea in confession and avoidance might admit such an agreement in fact, and avoid its legal or binding effect by alleging that it was only a parol contract and not under the defendants' seal. But it is now held, 10 M. & W. 393, *Leaf v. Tuton*, that a plea that the contract declared on was not in writing, though required to be so under the Statute of Frauds, is bad, as amounting to the general issue, or general denial of the agreement, because a plea of general denial would throw upon the plaintiff the onus of proving a written contract. So here, if in the face of the declaration, the agreement stated is one that would not bind the defendants unless entered into under their common seal, a denial of the agreement would require the plaintiff to prove a sealed contract, or he would fail on that issue. Now, whether if denied he could or could not prove it, is in these pleadings a question of uncertainty; enough does not appear to shew, that consistently with the declaration, he could not do so, without varying from the contract alleged. I am, therefore, not satisfied the declaration is bad on general demurrer, on the ground that if necessary to its val-

idity, it must be intended that the agreement was under the defendants' seal, since the pleadings do not clearly evince the contrary—See *Hamilton v. Niagara Dock Company*, in our court.

Assuming, however, that the intendment should be the other way, and that the court must take notice that the plaintiff is declaring on a simple contract, to which the defendants thereupon except as not binding upon them in law; I am (though not without much doubt) disposed to think it sufficient. The cases applicable to this question are numerous and not consistent.

The result of them seems to me to shew—

1st. That there is no substantial difference between debt and assumpsit—that is in the form of action, so far as respects the efficacy and binding validity of simple contracts, or of simple contract demands—4 Bing. 75, *Mayor of Stafford v. Tilt*, and per *Patterson, J.*, 6 A. & E. 72.

2ndly. That there is no difference between executed and executory contracts—see 4 Bing. 75 *supra*; 4 Bing. 283; *The East London Water-Works Company v. Bailey*; *Beverly v. The Lincoln Gas Light and Coke Company*, 6 Ad. & E. 829, and *Church v. The Imperial Gas Light and Coke Company*, 6 Ad. & E. 846—or between contracts or promises express or implied by law—*ib.*

3rdly. That trading Corporations may, in many cases, sue or be sued in assumpsit.

The defendants are appointed under the statute 6 Wm. IV, c. 69 (see sec. 8), and 4 & 5 Vic., ch. 65 (sec. 6 & sec. 11), which makes no special mention of contracts, and the recent cases in England more especially important, are—6 Ad. & E. 829, *Beverly v. The Lincoln Gas Light and Coke Company*; 6 Ad. & E. 846, *Church v. The Imperial Gas Light and Coke Company*, in error; 6 M. & W. 815, *The Mayor of Ludlow, &c. v. Charlton*; 4 Jurist, S. C. 5 Q. B. 526, *Hall v. Mayor of Swansea*; 8 Jur. 213, S. C. 657; 5 Bing. N. S. 270, *Gibson v. E. I. Company*, and *Tindal, C. J.*

The second case—6 A. & E., very much resembles the present, except that there the corporation were plaintiffs in the palace court of Westminster, against the plaintiff in

error, upon a simple contract executory for the supply of gas. The defendants in error complained, in their declaration below, that the plaintiff's had agreed to take from them, and that they had agreed to supply them with gas sufficient for two lights for one year, from a day named, and so from year to year, at the rate of 12*l.* 16*s.* per annum therefor; then after averring mutual promises of performance, and readiness, &c., they assigned for breach, that though ready to supply, &c., for the quarter, from 1st October to 31st December, 1834, yet the defendant did not accept, or pay or give three months' notice of his intention to discontinue according to the terms of the agreement; plea, non-assumpsit; an other plea; and verdict for the corporation. In giving judgment Lord Denman used language equally applicable to the present case. In overruling *East London Water-Works Company v. Bailey*, 4 Bing 283, so far as it rested upon a distinction between contracts executed and executory, he said it was sustainable on other grounds—as the Court of Common Pleas might reasonably have held that a contract with a water company for the supply of iron pipes, was neither one of so frequent occurrence or small importance, or so brought within the purpose of the incorporation, that the principle of inconvenience required it to be taken out of the general rule, viz., that a corporation contracts under its common seal: again, on the face of this record we must understand this company to have been incorporated to supply individuals willing to contract with them for gas light and coke, and the present appears to have been a contract for the supply of gas for a year, amounting to 12*l.* 16*s.*, and so from year to year. We cannot be ignorant that such contracts must be of frequent and almost daily occurrence, and to hold that for every one of them, of the same or less amount (for where the sum is so small, a diminution of half would not vary the principle, which principle he had previously stated to be convenience, amounting almost to necessity), it was necessary to affix the common seal, would be so serious to impede the corporation in fulfilling the very purpose for which it was created, that we think we are bound to hold the case fairly brought within the principle of the established exceptions.

6 M. & W. 815, was a case of covenant by the plaintiffs, to which the defendants pleaded a set-off of 500*l.*, for pulling down and altering the site of a house, and altering the roadway there, and for work and labour, &c., to which the replication took issue; and on the evidence the plaintiff objected the want of a seal to the contract relied on by the defendant. Rolfe, B., delivered the judgment of the court, and his remarks were certainly calculated to weaken the force of the decisions in 6 A. & E. 846—and to restrict rather than to extend the doctrine contended for and adopted in these cases. It was, however, the case of a municipal, not a trading corporation, and in relation to a transaction peculiar in its nature, and quite without the ordinary business and affairs of the body corporate.

5 Q. B. 526—was also a case of assumpsit against a municipal corporation, and the action (for money had and received) was sustained on the ground of necessity—Lord Denman referred to the case of 6 M. & W. 815, and said: “We are not to regard the circumstances of particular cases, but to look at the governing principle, and that is necessity—the only proper ground on which these actions, in the case of corporations aggregate, can be placed:” again, that “the true ground is necessity, which ground was (satisfactorily) shewn to exist there.”

The cases of *Hamilton v. The Niagara Dock Company*; *The Kingston Marine Railway v. Phillips et al.*; *Davis v. Grand River Navigation Company*, are cases in this court and material.

Now looking to the object for which the defendants are incorporated, it will be seen that the purposes contemplated are the supply of the city of Toronto, and the inhabitants thereof, with gas light and water, and it is evident that in relation to individuals supplied with gas light and water, as distinguished from the city, such transactions must be conducted by contracts between the company and the consumers, of frequent and repeated occurrence, and that all such contracts would be in the prosecution and exercise of the very object for which the company was created.

Tested then by the rule laid down by Lord Denman, viz., necessity, or convenience amounting almost to necessity, and as he suggests, not regarding the circumstances of particular cases, but looking at the governing principle, it seems to me clear, that to hold all contracts with private consumers of gas light and water, to be entered into under the common seal of the defendants, would be attended with the utmost inconvenience, and that such contracts may fairly be brought within the principle of inconvenience, amounting almost to necessity, so as to dispense with the seal; and if that be a correct view in relation to such business of the company generally—if such matters generally come within the governing principle, then I do not see any solid ground upon which the present case can be made an exception thereto.

It is not more special in its provisions than the case 6 Ad. & Ell. 846. Here the agreement is for one year certain—there it was a year, and from year to year, subject to be determined by three months' notice. There 12*l.* 16*s.* a year was to be paid for the supply of gas for two lights, payable quarterly. Here the price for the year is 40*l.*, payable at the rate of 4*l.* 5*s.* a month from the 1st April to 1st December, and 1*l.* 10*s.* per month from the first December to 1st April; the supply (as stated in some of the counts) being limited to a quantity sufficient for 2,400 baths, and 4*d.* a puncheon for any excess.

There is certainly a difference in the price—restricting the supply, in that case, to a year only—and there it would appear the agreement had been partly executed on the part of the company, indeed by both parties. Here performance or payment on the plaintiff's part, &c., and acceptance on the defendant's part, up to the time of action brought, which is within the year, is averred, and of course admitted by the demurrer, and shews that the defendant's have accepted, so far, the benefit of the agreement; and at all events by act in *pais* recognized and adopted it. There the company were plaintiffs—here they are defendants, but there as here, the declaration was on an executory contract, and I cannot satisfactorily distinguish the cases in principle or in circum-

stances. Then looking at the governing principle and contemplating the cases generally that would fall within it, I cannot perceive any substantial difference between this case and others of a like nature. The agreement is with an individual inhabitant. The quantity of water is to be regarded by data, which, I must suppose rendered it easily to be determined—the price and periods of payment are fixed. It is true that the supply is for the plaintiff's baths instead of ordinary domestic use, if that can make any difference; indeed it is the only particular in which it is peculiar, for in all other respects such a contract might well be made with any inhabitant obtaining water from the defendants, viz.: a certain price for a certain quantity, and a certain price for any excess, with fixed periods of payment. If private contracts for gas and water may in general be entered into without seal, so as to bind the parties on the score of inconvenience or necessity, we must suppose that such business is conducted and carried on under some system of rules and regulations of the company, and if so and if the contracts in general made in conformity therewith are valid, without seal, I cannot say that any good reason occurs to me for making this exception.

What the practice or the extent of the business of the defendants are, I, of course, know not. Their business may be very limited or very extensive, and they may uniformly contract under seal, or otherwise. I am only speaking as to what I consider probable, from the nature of the business, and the constitution and system of management through directors, contained in the statute of incorporation; and the cases warrant me in relying upon the presumed multiplicity of the business and details, in determining the rule of inconvenience and necessity in excepted cases. The insignificance or smallness of the matter is not the only test—inconvenience and necessity are likewise grounds for dispensing with the seal, such necessity being decided with reference to classes of transactions or business in general, and not only by the particular circumstances of any given case; at least so I understand Lord Denman.

I expressed my impressions on this subject, at some

length in *Hamilton v. The Dock Company*, but perhaps went further in my remarks than the recent decisions fully warrant; I did not ground them exclusively upon the smallness, or insignificance, or mere inconvenience, or necessity of the case, but rested also upon what I must say has always appeared to me the most satisfactory and consistent view, which is suggested by *Murray in E. I. Company*, 5 B. & A. 204; (see 5 Bing. N. S. 270; 13 Jurist, 65)—that such a mode of dealing and contracting is (if not expressed) contemplated in the statute creating the corporation, from the very nature and purpose for which it was constituted. In such a distinction I can see some principle—I can see none in making it depend upon the mere value or amount, or frequency of repetition, or inconvenience, short of absolute necessity.

I cannot say that, as respects the defendants' operations, there is any absolute necessity for a dispensation with their seal in contracts with individuals for the supply of gas or water, neither was there any such necessity in the case in 6 A. & E. 846.

The court there seemed to have inferred the necessity, from the multiplicity of such contracts, but such necessity cannot be absolute, or anything more than inconvenience; let it be an inconvenience amounting almost to a necessity, in that case; if so, a like inconvenience may be equally inferred in the present case.

Considering, therefore, the object and purposes for which the defendants were created a body corporate, the multiplicity and frequency of such transactions as agreements for supplies of gas and water, the exigency thereby created, amounting to great inconvenience, if not actual necessity, for relaxing the rule, and the close resemblance which this case bears to the contracts for like supplies, that may be supposed to be ordinarily made by the defendants with their customers; I think the contract (though not under seal) binding, and the declaration therefore good.

Confined to the mere test of insignificance or necessity, the English authorities certainly warrant an opposite view: I have adopted that which seems to me the most reasonable

and just deduction from the scope and spirit of the whole. Had the defendants denied the contract, the onus of proving it would have been cast upon the plaintiff, and he would have been bound to establish it by legal evidence sufficient to go to the jury, and also sufficient to satisfy them of its legal existence, or he would fail on the trial. That the contract, not being to be performed within a year, should be evidence in writing under the statute of frauds, is of course, not at present a question.

McLEAN, J.—This action is brought for the recovery of damages from the defendants for not fulfilling a contract for the supply of water to the Toronto Baths, which are kept by the plaintiff.

The declaration contains four counts, in none of which does it appear that the agreement was in writing or under seal.

In order to maintain assumpsit, it was not necessary to shew or set out a contract in writing, and that form of action could not have been adopted had the agreement been under seal. That it is not under seal, I think, must be assumed from the fact that no profit is made of it, and that the plaintiff has filed his declaration in assumpsit. To the first four counts of plaintiff's declaration the defendants have demurred generally, and the grounds set out on the margin of the demurrer, and insisted on in the argument, are that the agreement in each of these counts mentioned, ought to be under seal, and it is not so shewn in these counts, and that the defendants being a corporation could not make the said agreement except under their corporate seal.

As to the question then, whether not being under seal, this contract is valid. It is admitted that corporations may enter into agreements, not under seal, for the purpose of carrying on the ordinary every-day transactions for which they may be formed, and that actions of assumpsit may be maintained by or against them on such agreements; but that for all matters out of the ordinary course and routine of business, a contract must be entered into under the corporation seal. There are, as it appears to me, very good and substantial reasons why this should be so. In the ordi-

nary dealings of such a company as the defendants with their customers in the supply of gas or water, their proceedings must necessarily be very much encumbered and embarrassed, if they were obliged in every case, no matter how trifling, to enter into a contract under their corporate seal, and therefore there is a necessity that in such cases, they should be at liberty to contract otherwise than under seal ; but in matters out of the course of ordinary dealing, such, for instance, as the erection of buildings, or putting up any machinery, there is good reason why a contract under seal should be required, in order to shew that the whole body of the corporation are assenting to it.

In this case the contract declared upon is for not furnishing a supply of water to the plaintiff's baths, and one of the objects of the corporation being to supply water to the inhabitants of the city, it cannot be denied that the contract for that purpose comes strictly within the ordinary business of the company, and as such, may be entered into without being under seal. But it is alleged that though in ordinary cases the defendants may make parol agreements for the supply of water, this agreement was, according to the plaintiff's shewing, so special in its provisions as to take it out of the general course of dealing, and to make it necessary that the contract should be under seal.

I confess I am unable to draw any distinction between this case and the cases which have been mentioned of *Beverly v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 829 ; and *Church v. The Imperial Gas Light and Coke Company*, 2 N. & P. 289—they involve, as it appears to me, precisely the same principle, and in the latter case Lord Denman, in delivering the opinion of the court, says: on the face of this record, we must understand this company to have been incorporated for the purpose of supplying individuals willing to contract with them for gas light and coke, and the present appears to be a contract for the supply of gas for a year, amounting to 12*l.* 16*s.*, and so from year to year. We cannot be ignorant that such contracts must be of frequent and almost daily occurrence, and to hold that for every one of them, of the same or less amount, it was necessary to affix

the common seal, would be so seriously to impede the corporation in fulfilling the very purpose for which it was created, that we think, we are bound to hold the case fairly brought within the principles of the established exceptions; and in a former part of that judgment, he states what in the judgment of the court, these exceptions were: he states the principle which ought to govern to be "convenience, amounting almost to necessity;" "wherever to hold the rule applicable (that a corporation must contract under its common seal,) would occasion very great inconvenience, or tend to defeat the very object for which the company was created, the exception has prevailed."

This language appears to me to be most applicable to this case. The defendants are incorporated expressly to supply water to all who may be willing to contract with them for it, within the City of Toronto—their agreements or contracts for that purpose must be of "frequent and almost daily occurrence," and varied only in the quantities which parties may require. The convenience of the company, "amounting almost to necessity," as Lord Denman observes in the case referred to, seems to take these contracts, therefore out of the general rule into the exceptions.

If the defendants then can enter into any such contracts, in the ordinary course of their business, for supplying water, to what extent can they do so? To hold that they may make a contract under seal, which shall be binding upon them and all parties, for the supply of a private dwelling, but they cannot do so for supplying a large hotel or public building, would be to attempt to draw distinctions and to establish rules, which must depend upon the varying opinions of the courts, and would introduce a degree of uncertainty as to the validity of such contracts, which could not fail to be extremely inconvenient and prejudicial.

In this case the plaintiff alleges, that he has paid to the defendants the consideration agreed upon, to be paid monthly, for supplying water for the use of the baths under his charge. If the defendants have failed in the performance of their contract, he is entitled to redress. Had *he* failed the defendants under the authority of the case of *Church v.*

the Imperial Gas Light and Coke Company, could have maintained an action against him on his agreement, and could have compelled him to pay the stipulated price. If the agreement then could be enforced by them, it seems to me to follow that it can be enforced against them.

SULLIVAN, J.—The objection taken in the argument, that this action was not sustainable until the expiration of the year, I think, must fail. It is absurd to say that all the water required for a bathing house during a year, might be furnished on the last day. The defendants undertook to furnish the baths with water as required, and as I understand the agreement set out, continuously, as it might be wanted.

Exceptions might have been raised to this declaration, which probably, would prevent the plaintiff recovering upon it. It is only necessary to notice those that have been brought before us, except that I may be permitted to say, that if the plaintiff should prevail upon this declaration, it by no means follows that it will be a safe precedent in a future case of the same nature.

As regards the main question raised on this demurrer—whether an action of assumpsit can be raised against this corporation in the contract declared upon—I fully agree with my brother Macaulay. I do not think it necessary to follow him in discussing the rules which prevailed in the earlier times, or in examining the old cases on this subject. The courts profess not to have altered the law as it formerly stood, but the increase of trading corporations, in late years, has manifestly created a tendency in the courts, to extend to the utmost, the relaxations from strict rule allowed by the old decisions, and to make use to the utmost, of the arguments of necessity or convenience upon which these were founded.

It is admitted on all hands that the general rule is, that a corporation cannot contract unless under seal: this was relaxed for the ends of justice in favor of corporations, to enable them to recover on contracts, when the considerations were executed against corporations of a certain character, because contracts not under seal, form a part of their neces-

sary business; an early exception to the rule was in favour of contracts of a very ordinary and trifling character, and of very common recurrence—such as the employment of ordinary servants; these distinctions have given rise to much nice discussion, and to great difficulty of decision, as the principles came to be applied to a new state of things; but now it seems to me that the law is clearly settled, and that this is not one of the cases in which any valuable distinction can be taken which would make it necessary to depart from the late decisions.

To begin with the case of *Beverly v. The Lincoln Gas Light and Coke Company*, 2 N. & P. 283—that was an action by a tradesman against the company for the price of six gas meters, ordered by the committee of the company, to be returned if found inadequate. The action was *assumpsit* for goods sold and delivered: the jury found that the meters were furnished and not returned within a reasonable time. And the court held, for the first time, that a corporation might be sued in *assumpsit*, on an executed *parol* contract. The case of the *Mayor of Stafford v. Tilt*, 4 C. & P. 110, had decided in favour of the action of debt against a corporation for goods sold.

Then came the case of *Church v. The Imperial Gas Light and Coke Company*, 3 N. & Perry, 35. The corporation were plaintiffs in the court below, and the action like the present one, was *executory*. It was upon a contract to accept and pay for gas for one year, and so on, from year to year, until three months' notice to stop. The breach was for non-acceptance, and non-payment; and Lord Denman, assuming it to be then established, that a corporation might sue or be sued in *assumpsit* upon executed contracts of a certain kind, amongst which are *included such as* relate to the supply of articles essential to the purposes for which it is created, gives it as the opinion of the court, that as regards this point, and in respect of such contracts, there is no sound distinction between contracts executed and *executory*. "The same contract," his lordship says, "which is *executory* to-day, may become *executed* to-morrow. If the breach of it in its latter state may be sued for, it can

only be on the supposition that the party was competent to enter into it in its former state; and, if the party were so competent, on what ground can it be said that the peculiar remedy which the law gives for the performance of such a contract, may not be used for the purpose?" His lordship proceeds to shew that there is no tangible difference between a contract implied by law, upon an executed consideration, and one, the consideration of which is executory, and the contract express. The difference, he says, is merely in the mode of proof. The court there decided in favour of the plaintiffs in the court below; and, in so doing, expressly overruled the case in the Common Pleas, *East London Water Works v. Bailey*, and decided the case before them on the ground that, on the face of the record, they must understand the company to have been incorporated for the purpose of supplying individuals willing to contract with them for gas-light and coke; and that they could not be ignorant that such contracts must be of frequent and almost daily recurrence.

The case of the *Mayor of Ludlow v. Charleston*, 6 M. & W. 822—The Court of Exchequer, to use the language of Baron Rolfe, subscribing to every word of Lord Denman's judgment, decided, in the case before them, against the competency of the Corporation of Ludlow, to bind themselves by a contract not under seal, for specific allowances for improvements in building in the town, on the express ground that the argument of convenience almost amounting to necessity, did not apply.

The case of *Arnold v. The Mayor of Poole* 4 M. & G. 444, was an action of debt for work and labour as an attorney, and was brought upon a number of bills of costs in different suits, in some of which the plaintiff was appointed attorney under seal, and in some not. The court, after reviewing and confirming the former decisions, decides against the legality of an appointment of an attorney, not under seal, "for the appointment of an attorney to conduct important suits, affecting the rights and property of the corporation, cannot be considered a trifling matter, nor is it of such frequent recurrence or of such immediate urgency, as to

render it inconvenient to postpone it, till the seal of the corporation can be affixed to the retainer.—5 M. & G. 131.

Hall v. the Mayor of Swansea, 5 Q. B. 526—was an action of assumpsit for money had and received, brought by an officer of the corporation for tolls legally coming to him, but received and appropriated by the corporation; the action was sustained on the ground of *necessity*, and because of its analogy with the action of trover, the former authorities were recognized in this case, and the necessity was one arising from the nature of the transactions, which made the motion of a contract under seal, to return money wrongfully received, an absurdity.

The case of the Queen v. The Mayor of Stamford, was on the traverse of the return to a mandamus, for compensation or loss of office under the Municipal Corporation Act. The jury found an agreement to raise the salary of one office as compensation for the loss of another, and the actual receipt of the increased salary; but the agreement being traversed, the court held that it could not be recognized, not being under seal.

I see nothing in these cases to weaken the one of Church v. The Imperial Gas Light Company, a purely executory contract, not more in the way of the business of the company, than the present contract was in the way of the ordinary and daily business of the defendants. If the plaintiff had refused to accept and pay for the water according to contract, I think he would have been liable to the company; and I think the company liable to him, for the breach of the contract on their part, if it be properly declared upon.

I cannot take any distinction, because this contract is for the supply of a bathing house, and one for an ordinary dwelling. The whole amount of the contract involves no sum or consequence of extraordinary importance; and to say that a contract for the supply of a bathing house or a manufactory, shall be subject to a different rule of law from a contract for the supply of a tavern, or boarding house or dwelling house, would, in my opinion, be to establish dangerous and useless distinctions, which no one could tell where they would end, if once they had a beginning.

Mr. Justice DRAPER being in the Practice Court during the argument, gave no judgment.

Per Cur.—Judgment for the plaintiff on demurrer.

ROBINSON, C. J., *dissentiente*.

DOE WISMER V. HEARNES.

Notice to quit—demand of possession.

A. had a lease from the government of a clergy reserve lot for 21 years, ending in 1837—A. sublet to B.—In 1843, after the term had expired, A. obtained a patent in fee from the crown, and finding B. still in possession, he brought an action of ejectment against him—*Held, per Cur.*—that under these facts, B. was not entitled to a notice to quit, or to a demand of possession.

Ejectment for the south-east 20 acres of lot 18, 7th concession of Markham.

The plaintiff in this case had obtained a verdict, and the defendant had moved on leave reserved to him at the trial, that a nonsuit be entered, on the ground that he was entitled to a notice to quit, or at least to a demand of possession, before the action was brought.

The facts of the case fully appear in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

I do not see in the report of the learned judge, who tried the cause, on what ground he could grant the nonsuit. The plaintiff's title was clear under the patent issued in 1843. If the defendant had proved all that he attempted to prove, it would have shewn that before the crown made this grant to the lessor of the plaintiff, and while the lessor of the plaintiff held a 21 years' lease from the crown of the whole lot 18, he leased the rear 50 acres of it, which must embrace, I suppose, the 20 acres now in question, to Moses Wismer, with all right of renewal or other privilege whatsoever to the second 50 acres, which probably meant all claim, so far as regarding these 50 acres, to a further lease from the crown, which Wismer might be admitted to have as lessee of the whole lot.

As to any right to purchase, it could hardly have been contemplated at that time, for the lot was a clergy reserve, and in 1824, when this writing was given to Moses Wismer, there was no power in the government to sell the clergy

reserves, nor had any assurance then been given, that any one could be allowed to buy them.

It is not pretended that the lease to Wismer contained any such assurance. The crown lease to the lessor of the plaintiff expired in 1837, and if the defendant, upon the trial, had succeeded in proving such a sub-lease or assignment to Moses Wismer of part of the lot as has been mentioned, and if Mr. Wismer had continued always in possession, under that assignment, and had been the defendant in this action, it could not be said that, by virtue of this assignment of a term which ended in 1837, he was holding under this lessor of plaintiff in 1848, when this action was brought. There could be no privity between them by force of that lease, or their previous relations under A., after the term was ended, and after the patent issued to the lessor of the plaintiff in 1843. Nor do I consider that we could in such a case, have held that there was any permissive occupation under the lessor of the plaintiff after 1837, and still less after the patent issued in 1843, which granted him the fee.

In all that is shewn, the crown may have refused to recognize any right of pre-emption under the circumstances, in the former sub-lessee of a fraction of the lot.

When to this is added the connection between the title which ceased in 1837, and this defendant, was not made out on the trial, I cannot understand what the defendant can possibly suppose he has to rely upon, for supporting his claim to notice of any kind.

Per Cur.—Rule discharged.

JOHNSON AND WIFE V. MCGILL.

Dower—pleadings and evidence in.

Held *Per Cur.*, that under a plea to an action of dower—that the husband was not seised of the lands—the demandant could not be allowed to recover, on merely giving evidence that the husband had been in possession of the estate, without proving his title.

Dower unde nihil habet.

Demandant sued as the widow of William A. Johnson, for dower in lands in the township of Reach.

The tenant pleaded—1st. *Ne unques accouple.*

2ndly. Denying that her husband was ever seised of the lands.

The demandant had served a notice to procure deeds, in order to give secondary evidence of the title of the husband, but no deed was produced, and the notice was not given in due time, and it was not shewn that the deed was in possession of the defendant.

On the argument, it seemed to be admitted that the only question to be determined was, whether the demandant would be allowed to recover under the second plea, on merely giving evidence that the husband had been in possession of the estate, without proving his title.

The jury found for the plaintiff on both issues.

Hagarty obtained a rule to enter a nonsuit on leave reserved, or for a new trial on the law and evidence, and for admission of improper evidence, and, for misdirection, without costs.

Hector shewed cause.

The authorities cited were—1 U. C. R. 157; 5 U. C. R. 28; *McKinnon v. Burrows*, U. C. R., Hil. Term, 5 Wm. IV. 14 M. & W. 250; 13 Vez. 119.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the demandant could not properly be allowed to recover on such evidence, and that the rule for nonsuit on the leave reserved at the trial, should be made absolute, unless the plaintiff desires to have a new trial, on payment of the costs of last trial and of this application.

It may be allowed, in an action of ejectment, for a party to recover on the mere presumption of title which arises from actual possession, where no better title is shewn; because, if there is in fact a better title behind, the true owner will not be finally concluded by the verdict; but in real actions parties must make proof of title. Right of possession alone is in question in the one case, but the right of the husband to the estate, upon this issue, was the matter which the jury were sworn to try.

[*Per Reporter*.—The court afterwards granted a new trial; costs to abide the event.]

NEVEN v. BUTCHART.

The affidavit to arrest in a special case—requiring the sanction of a judge to the issuing of a writ—need not follow the form prescribed by the act; that form of affidavit only considered necessary in matters of debt, where the creditor himself may sue out the *capias*, as of right.

The defendant in this case moved to set aside the judge's order to arrest, and the arrest made under it, with costs.

1st. Because the affidavit did not disclose any certain or proper cause of action.

2ndly. Because it did not state that defendant was about to leave Upper Canada, with intent to defraud the plaintiff, or for any improper motive.

The affidavit was by a young woman, who swore that she had been seduced by the defendant, and had a child by him; that before the child was born, and after, he had promised her marriage, but had wholly refused to marry her, or to make provision for the support of the child, and had expressed his determination, in order to avoid the consequences of an action at law, to leave the province immediately, and with a view to so doing, had disposed of all his property; and that deponent had good reason to believe, and did verily believe that he was immediately about to leave Upper Canada.

Upon this affidavit, a judge's order was obtained; and Butchart arrested on the 3rd of January, and gave bail on 19th; and he now moved to set the writ aside.

The judge's order was "to hold to bail in *assumpsit* for 40*l.*"

ROBINSON, C. J., delivered the judgment of the court.

The affidavit states a clear cause of action for breach of promise of marriage, and is sufficient, I think, in regard to the allegation of deponent's belief that Butchart was immediately about to leave the province.

The exact form given in cases of debts due, could not be followed in a case of this kind; and as there must be some departure from it, it is for the judge applied to, to exercise his discretion in determining that the law of arrest has been complied with, according to its spirit. The form prescribed by the statute is of the affidavit on which the creditor him-

self may sue out a *capias* as a right, without a judge's sanction.

We are not to hold this affidavit irregular, merely because it does not follow that form.

Per Cur.—Rule discharged.

THE QUEEN V. EMMA SHERIFF.

Application as against the mother, by the father, to the court, for the custody of his child. *Quere*—The kind of application the father had better adopt, to bring the matter fully before the court?

On the 10th of January, 1849, a writ of *habeas corpus cum causa* issued from the court upon the fiat of a judge, directed to Emma Matilda Sheriff, of the district of Dalhousie, commanding her to bring up the body of Louisa Barbara, the daughter of her and of Robert Sheriff, said to be detained by her against the will of her husband.

This writ was returnable on the first day of Hilary Term. It had been granted on an affidavit of Robert Sheriff, that the daughter was an infant, eight years old—that his wife had lived separate from him since March, 1847, leaving this child and three other children of theirs with him, the father—that in October, 1848, the child, Louisa Barbara, was inticed away from him, and detained by her mother contrary to his will—that the mother lived at a tavern and associated with improper persons, and had a child since she separated from him, of which he was not the father; and he prayed that his child might be restored to him, in order that he might provide for her education, as he was doing up to the time of her being seduced away from him.

On the 7th of February, Mrs. Sheriff filed a general return to the writ, that she had not the daughter in her custody, and had not at the time of the writ issuing.

And on the 12th of February, she filed a further special return, setting forth that Louisa Barbara was living with her, of her own free will, and without the coercion of the defendant—that her husband, on the 10th of March, 1847, removed from his place of residence and deserted her, taking their children with him—that in October last, Louisa Barbara came of her own accord to the defendant, and had

since continued to live with her, and was unwilling to return to her father—that her husband had frequently since been to see his daughter, and had conversed freely with her, and that she, Mrs. Sheriff, had in no way prevented his taking the child away—that she was herself indigent, and had not the means of paying the expense of a journey to Toronto, with the child, and for that reason only had not obeyed the writ—but that she was ready to obey any order the court might think fit to make on her.

She filed also an affidavit of her brother, William Taylor, corroborating this return, and her own affidavit, in which she stated explicitly that she did not detain the child in question, but that the child had always been at liberty to go with her father, if he desired to take her.

Strong, of Bytown, applied on behalf of the father. *Eccles* shewed cause.

The cases cited in argument were, *Cowper*, 672; 1 P. & D. 553; 20 State Trials, 1375; 2 U. C. R. 370; 4 Scott, N. R. 200; 5 A. & E. 441.

ROBINSON, C. J., delivered the judgment of the court.

The return, according to the practice at common law, which is all we have to guide us in cases of this description, cannot be controverted on affidavit.

The father, as we are told by his counsel, does not pray for the actual bringing of the child into court.

The better course would have been to have moved in this court, in term time, for a rule to shew cause why the writ should not issue, and then the grounds and object of the writ, and the necessity for it, could have been discussed conveniently upon affidavits properly filed on both sides.

As it is, we are told by the return of the writ, that the father can have the child at any time, and the mother disclaims detaining her against her will, or the will of her husband, and declares that the husband is at liberty to take the daughter at any time, if she will go with him.

We had thought, under these circumstances, at one time, of leaving it to the father to put the truth of this return to the test, by going and demanding his child; and if he could

not obtain her, he might apply next term to the court for an alias writ, which would be granted to him. But in that case, we must have directed the applicant to furnish the mother with the means of obeying the writ; for we cannot insist on her doing what she represents to be impossible, that is, to bring the child up at her own charge, a journey of 300 or 400 miles.

On further consideration, however, as neither party desires to have the child brought before the court, and as the mother professes herself, by the return to the writ, to be willing to obey whatever orders we may think it right to make in the premises, we think it the better course to order at once, that a rule issue upon Mrs. Sheriff to give up the child to its father, upon his request.

There is no intimation of anything exceptionable in the character or conduct of the father, no reason why he should not have the custody of his child, and the child itself is not of an age to prefer, on any *rational* ground, the being with the one parent more than the other.

We have no reason to apprehend that we can be doing anything unfavourable to the interests or safety of the child by restoring her to the proper custody, but quite the contrary.—2 U. C. R. 370; 4 A. & E. 624; 5 A. & E. 441; 4 Scott, N. R. 200; 5 E. R. 221.

Per Cur—Child to be given to the father on request.

BOSWELL V. RUTTAN, SHERIFF.

The special title which a sheriff acquires in goods seized by him in execution—when pleaded as a defence to an action of trover—may be well answered by the replication of *de injuria*.

The allegation, by way of express colour in a plea, is not traversed by the replication *de injuria*.

The plaintiff, as assignee of Gibb and Walker, bankrupts, sued the defendant, Sheriff of the District of Newcastle, in trover, charging the conversion of the goods in the time of the assignee.

The defendant in his 4th, 5th, 6th, 7th, 8th and 9th pleas justified as sheriff, under writs of *fi. fa.*, against the goods of Gibb, at the suit of different creditors, under which he averred, that before the bankruptcy of Gibb & Walker,

co-partners in trade, delivered to him for the purpose of levying the debt out of an individed moiety of the goods.

The defendant then set out the subsequent issuing of the commission of bankruptcy, and the assignment of the bankrupt's effects to the plaintiff as assignee, and gave colour by averring bailment of his goods to Richard Roe, and a delivery over by him of the goods to plaintiff as assignee, wherefore, &c.

The 9th plea was the same in form, justifying under a *fi. fa.* against Walker alone, as the other pleas had justified under writs of *fi. fa.* against Gibb.

The plaintiff replied to all these pleas, admitting the several judgments and execution, and the delivery of the writs to the sheriff, and averring that the *plaintiff de injuria sua propria et absque residuo causæ*, committed the grievance, &c.

All the replications were demurred to; and the causes assigned were, that the pleas relied upon a special title, acquired by the sheriff under the seizure made before the bankruptcy, which title existed previous to and independant of the act complained of as a conversion, and that it was therefore necessary for the plaintiff to traverse the title of defendant specially, which he had only done argumentatively and indirectly.

All the pleas and replications were the same in substance and form, differing only in the defence in each being rested on a different writ of execution.

P. M. Vankoughnet, for the demurrer. *Cameron, Q. C.*, contra. The authorities cited were—10 Bing. 167; 3 B. & A. 13; 3 Tyr. 438; 1 Clark & Finelly, 77; 3 A. & E. 741; Jurist, 8th April, 1848, page 267; 8 Vol. N. S. Law Magazine, 285; 8 Q. B. R. 294; 16 M. & W. 1; 4 Dowl. & Lownd. 286; 8 A. & E. 871.

ROBINSON, C. J.—The decision must be the same in respect to all the replications. They have not the effect of traversing what is merely alleged by way of colour, and it is not therefore an objection that they put that improperly in issue, for they do not put it in issue.—1 Saund. 28 (note a.); 2 Saund. 295 (notes f. g.).

It is contended that the replications are bad, upon the principles laid down in Crogate's case, 8 Co. 66, for that the sheriff, by the seizure alleged in the plea, acquired a *special title* in the goods, and that by an act antecedent to, and independent of that complained of as illegal, which special title required to be denied by a special traverse.

But we do not consider that there is any authority for holding that the act of the sheriff, in seizing goods under execution, gives him that kind of title to the goods which can come under the second resolution in Crogate's case, admitting that title *to the goods* and interest *in the goods*, may be treated as coming under the same head, and that what is there said of lands applies equally to chattels.

The principle laid down by Parke, J., in *Selby v. Bardons*, 3 B. & Ad. 13, seems to be clearly admitted. Adopting the rule in Crogate's case, that the replication *de injuria* is proper when the defendant's plea doth consist merely of matter of excuse, and no matter of *interest* whatever, Mr. Justice Parke understands, he says, by that, that Lord Coke means an interest in the reality, or an interest in or title to chattels averred in the plea, and existing prior to, and independently of the act complained of, which interest or title would be in issue on the general replication; and he takes the principle of the rule to be, that such alleged interest or title shall be specially traversed, and not involved in a general issue.

Now execution is one act: all depends in this case on the legality of the act of seizure of the goods, which took place, it is true, before the assignment, as the plea states—but the subsequent sale of the goods could be no wrong against the assignee, if the seizure of them in execution was lawful. The provisions in our bankrupt laws made it the duty of the sheriff to go on. This is, therefore, the case put by the court in *Selby v. Bardons*, for it is, in effect, relying upon that as constituting a title to the goods, which is the act complained of. All refers back to the seizure, for the sheriff could have acquired no title to the goods, which entitled him to convert or detain them as against the assignee, unless he acquired such title by the act of seizure: he pretends no

other title, and the defendant has cited no authority in support of his position, that the special title which the sheriff acquires in goods seized by him in execution, is that kind of interest which must be specially traversed, according to the rule in Crogate's case.

It is not an interest in his own right; for the owner of the goods has still a disposing power over them, subject only to the authority of the sheriff to sell, which attaches by the seizure, and which will defeat any assignment made in the meantime by the debtor. But except for the purpose of completing the execution, and where a sale follows for that purpose an assignment made by the debtor, between the seizure and sale, would have effect; which shews that he has been only divested of his interest *sub-modo*, and that the sheriff has not that kind of interest in his own right, which comes within the rule referred to.—3 M. & W. 621; 3 Tyr. 438.

What is traversed, is the fact that the defendant did a certain act under the legal authority which he alleges, and which legal authority is admitted. That this alleged fact may be traversed is determined in *Lucas v. Nockells*, 10 Bing. 157. I refer also to *Carnaby v. Welby* and others, 8 Ad. & Ell. 872.

The plaintiff is entitled, in my opinion, to judgment on the demurrer; for the judgment and execution and delivery of the latter to the sheriff being admitted in the replication, all that is really in issue under the general traverse, is the alleged seizure before the bankruptcy; for when that is made out, the right to sell the goods afterwards unquestionably follows.

MACAULAY, J.—The defendant certainly relies on a qualified right of property, existing prior to and independently of the act complained of, but not an interest or title in his own right, or a servant of another, nor as against a wrong-doer; for, irrespective of the defendant's right, the right of the plaintiff is admitted, and the plaintiff's right is virtually the same as that of Gibb and Walker, and as if they were the plaintiffs. If so, then the plea would be as against two partners and joint owners, a seizure under a *fi. fa.* against

one of them, and *afterwards* dispossessing the two of the goods, in order to levy the debt of one out of a moiety.

This does not seem to me an *interest* or *title* under the rule in Crogate's case. It is not a *title*, for the defendant had no title; and though it is an *interest*, it is not a personal interest, but an interest acquired under an authority in law, which authority is not disputed or traversed.

Had the defendant sold the goods to A. B., and A. B. been the defendant, relying on title under the sheriff's sale, it would have been another thing. As it is, the defendant had at best only a *power to sell* a moiety, and a right to possession for that purpose; and a purchaser would acquire title under the defendant's authority in law.

The whole effect of the defendant's objection is, that the plaintiff should have specially traversed the *seizure*, as alleged under the *fi. fa.*, but this is done by *de injuria* (see 8 A. & E. 872, points 1 & 2); or that, admitting the seizure—that it was after and not before any act of bankruptcy, or the date and issue of commission—or that the defendant took the goods out of plaintiff's possession by virtue of such prior seizure.

It seems to me, all forms one joint defence under authority of law, which authority is admitted if the plea is otherwise good.—3 A. & E. 1.

I see no reason for giving express colour; and it is not traversed or in issue by this replication, which only puts in issue that which is material, though it does put in issue the whole *cause* so far as material.—2 Ea. 212; 1 Ea. 212; 12 Jurist, 256.

The matter set up is only excuse or justification. If Gibb and Walker were the plaintiffs, it would be a matter of justification or excuse, clearly so as to the *original seizure*, and equally so as to the *re-capture*, for it is nothing more.

McLEAN, J., and SULLIVAN, J., concurred.

DRAPER, J., being in the Practice Court, gave no judgment.

Per Cur.—Judgment for the plaintiff
on demurrer.

BENEDICT V. ARTHUR.

Common Carrier—what constitutes a.

A person engaging to transport goods for hire, is not by virtue of such engagement merely, a common carrier, and as such liable for all accidents, whether negligent or not.

Appeal from the District Court of the Wellington District.

Declaration. Case against defendant as a common carrier for hire.

Pleas. Denying that defendant was a common carrier for hire, or received goods as such.

It appeared from the evidence that defendant was a farmer and teamster, and had been on more than one occasion, employed by a third party to carry flour from Guelph to Hamilton, for the plaintiff. The flour had been injured by exposure to wet weather.

Upon these facts, the defendant applied to nonsuit the plaintiff, upon the ground that no evidence had been given constituting the defendant a common carrier for hire. The judge below refused to nonsuit; and the plaintiff had a verdict.

Upon an application in term to set aside the verdict for misdirection, the learned judge sustained the verdict.

This decision was appealed from.

D. B. Read for the appellant. *Muttlebury* for the respondent.

The cases cited on the argument were—1 E. R. 600; 6 B. & Al. 32; 8 M. & W. 372; 2 M. & R. 80; 8 C. & P. 207; Jones on Bailments, appx. 2; 6 A. & E. 924; 7 Moore, 283.

ROBINSON, C. J., delivered the judgment of the court.

An objection is taken that, as leave was not reserved at the trial to enter a verdict for the defendant, it would have been illegal to order it in the court below, and that upon that ground, if for no other, the rule was properly discharged.

But for all that appears, no objection of that kind was taken on the argument of the rule in the district court, and the transcript of proceedings does not shew conclusively, that the judge did not reserve leave to move to enter a verdict for the defendant.

The defendant, it is true, moved at the trial for a nonsuit; and the objection was overruled, but with leave reserved to

bring up the point in term, though in what particular shape is not stated, and the parties may have agreed that the defendant might have leave to move to enter a verdict for him.

On the point itself, we think it quite clear that, by the law of England, something more is necessary to show a man to be liable as a common carrier, than was shewn in this case.

A person engaging to transport goods for hire, is not by virtue of such engagement merely, a common carrier, and as such liable for all accidents, whether negligent or not.

No action would have lain in this case against the defendant, if he had *refused* to convey the goods; and that shews he was not a common carrier.

Per Cur.—Judgment below reversed, and verdict to be entered for the defendant.

MILLS V. SCOTT.

Pleadings—patents—meaning of the word “improvements.”

The plaintiff complained of the defendant having infringed a patent which he (the plaintiff) had obtained for a new and useful mode of generating and distributing heated air in dwelling houses: Plea—that the plaintiff was not the true or first inventor of the *said improvement in the said declaration mentioned* in manner, &c.: demurrer to plea—as bad—in traversing something not averred in the declaration: *Held per Cur.*—Plea good.

Case.—The plaintiff complained of the defendant having infringed a patent, which he (the plaintiff) had obtained for a new and useful mode of generating and distributing heated air in dwelling houses.

The defendant pleaded that the plaintiff was not the true or first inventor of the *said improvements in the said declaration mentioned*, in manner and form as he had in his declaration alleged.

Demurrer.—Because defendant, by his plea, rested his defence in denying something which had not been affirmed in the declaration.

Hector for the demurrer. *Crooks*, contra. The cases and statute cited on the argument, were—8 Scott, N. R. 337; 2 H. Bl. 463, 487; 8 T. R. 95; 11 E. R. 101, 109, note; 2 A. & E. N. S. 832; 7 Geo. IV., ch. 5.

ROBINSON, C. J., delivered the judgment of the court.

It appears to us that the plaintiff has demurred, in this case, without good ground. It is true the provincial statute 7 Geo. IV., ch. 5, treats of inventions and new discoveries of some *new and useful art, machine, manufacture, or composition of matter*, as one subject," and of "an *improvement in the principle of any machine or composition of matter, which shall before have been patented*," as another subject; and it makes particular provisions for the protection of each.

Because they have done so, the plaintiff thinks it right to infer that the defendant, when he uses the word "improvement" in his plea, can only mean to use it in that sense in which the statute has used it, and must therefore be regarded as speaking of some such improvement as is treated of in the second clause of the statute, that is, an improvement in the principle of something which had before been patented; but I do not think we are authorized to give it so confined a sense, and to hold the plea bad, because we will refuse to understand by it anything else than an improvement in the principle of some previous discovery, for which a patent has been obtained.

The word "improvement" has a large signification: we can speak of an improvement in *generating* and distributing heated air in dwelling houses, or of a new and improved method of generating and distributing heated air in dwellings, without necessarily alluding to any machinery or discovery that had been patented. And when the plea expressly refers us to the declaration, and says only, that the plaintiff was not the true inventor of *the said improvement* in the declaration mentioned, we must see and understand that he is speaking only of such an invention as the plaintiff had described, and that certainly does not include the idea of any previously patented discovery, to which the plaintiff was claiming to have added some improvement.

There is an inconsistency between the plea and declaration, unless it would be a misuse of terms to call a new and useful mode of doing anything an *improvement*, where there had been before, no particular invention patented for

the discovery of a certain method of doing the same thing.

A new and *useful* mode of doing anything that had been done before, must be an improvement in itself, if the invention is of any importance. We must suppose that the plaintiff's discovery was recognized as an improvement, when the Government gave a patent for it.

The plaintiff did not, in his declaration, happen to use the word "improvement," in speaking of it, though he might have done so with propriety, without being necessarily understood to mean that there had been any previous patent for an invention in that branch of art.

Then the defendant having evidently no other *improvement* to refer to, as specified in the declaration, than such as the plaintiff has described, pleads that the plaintiff was not the inventor of the said improvement, by which he cannot be understood to mean anything more than what, without any perversion of language he may mean, namely, an improved method of warming houses by an invention claimed to be wholly new.

Per Cur.—Judgment for defendant on demurrer.

HIFFERNAN V. THOMPSON.

Held, per Cur., that upon the following agreement, "on or before the 1st of May, 1846, I promise to pay to D. Thompson, or bearer, pine saw-logs, &c., for value received, &c., J. Hiffernan."—the logs must be considered as paid for—and that Hiffernan could not recover from Thompson the value of the logs, in an action of debt upon the common counts, for goods sold and delivered.

The plaintiff sued the defendant on a sealed agreement, whereby he contracted to cut good pine saw-logs sufficient to make 50,000 feet of lumber, and to deliver them at a place named, on or before the 1st of May, 1846; in consideration of which, the defendant agreed to pay or account to the plaintiff, at the rate of 12s. 6d. for every 1000 feet of such logs, which price was to cover Indian dues."

The plaintiff averred delivery of the logs according to the agreement, whereupon he claimed 31l. 5s., being the price according to the agreement.

Counts were added in debt for goods sold and delivered, and on account stated.

The defendant pleaded, 1st, *non est factum*.

2ndly, denying that plaintiff performed his agreement.

3rdly, payment of the 31*l.* 5*s.*, after the delivery of the logs.

4thly, *nil debet* to common counts.

5thly and 6thly, accord and satisfaction, and set-off.

The plaintiff gave evidence of about 50,000 feet, delivered to defendant on plaintiff's account.

The defendant then produced the agreement mentioned in the first count of the declaration. It was dated 28th May, 1845, and ran thus:—

"On or before the 1st of May, 1846, I promise to *pay* to David Thompson, Esq., or bearer, pine saw-logs sufficient to make 25,000 feet of clear lumber, and also pine saw-logs sufficient to make 25,000 feet of common lumber, both to be measured according to Clark and Street's rule of measurement; none to be under (specifying size); to be delivered at the mouth of McKenzie's Creek, for value received, in a barn, to be provided by me."

(Signed) "JOHN HIFFERNAN."

No price for the logs was mentioned in this agreement.

It was contended at the trial, that as the instrument produced shewed the plaintiff's undertaking to be, to deliver logs for a consideration already received by him, he could recover nothing.

Jones, of Hamilton, obtained a rule for a new trial, on the law and evidence, and for misdirection, and on affidavits.

R. Duggan, of Hamilton, shewed cause. The cases cited on the argument were—2 T. R. 366; Waddell v. McCabe, Easter Term, 4 Wm. IV., and *ib.* 5 Wm. IV.

ROBINSON, C. J., delivered the judgment of the court.

The affidavits and evidence leave the case in doubt on the merits. The defendant, however, concedes that he was to pay for plaintiff 18*l.*, on account of lands, and says that was to be in full. The jury seemed to have believed otherwise, and have allowed the balance, valuing the lumber at 31*l.* 5*s.*

The special count may be laid aside, for it is certain that the plea of *non est factum* prevents the plaintiff's recovering

for that, on account of the several substantial variances between the instrument set out and that produced.

The plaintiff not having it in his possession, has set it out as he best could, and as he would desire to make it appear to have been; but it is very clear that the agreement was not in the terms he has set it out.

There then being no evidence of an account stated, the only question is, whether the plaintiff could recover upon the evidence, in debt, on the common count for goods sold and delivered.

Independently of any legal question, I think the justice of the demand of the plaintiff is very doubtful, as far as I can judge from the evidence and the affidavits since filed; and so far as regards the legal question raised at the trial, my opinion is, that in the absence of any proof of fraud, the words "for value received" in the writing, should be held as conclusive that the plaintiff's undertaking was given in consideration of value already given by the defendant; in other words, that the logs had been paid for, and the agreement being to pay saw-logs, instead of in the common form, to deliver, strengthens that inference, though it is not very sensible and accurate to use the word pay, when no amount is specified.

If the agreement had been to pay a certain sum *in logs* the meaning would be clearer, but still the express acknowledgement of the plaintiff under his hand, that his promise was for "value received," does not leave it open to him to claim payment, as if he had received no value, unless he can destroy the effect of the receipt by shewing fraud.

Certainly on the face of the agreement produced, no action of debt would lie for the lumber delivered under it, for it appears that the lumber had been already paid for, and that the defendant therefore did not owe the value of it.

The defendant's own affidavit now filed, discloses facts which shows that the logs were not otherwise paid for, than by his assuming a certain liability on account of the plaintiff; and the question is, whether this was all the plaintiff was to receive.

We think the obligation of the jury to take the language

of the writing as binding on the parties, in the absence of proof of fraud, was not put quite strongly enough to them, and therefore assent to a new trial—costs to abide the event.

The evidence was far from satisfactory in any point of view.

Per Cur.—New trial—costs to abide the event.

MADDEN V. FARLEY.

Pleadings. Declaration—trespass for an assault on plaintiff's son—Plea—justification under the provincial criminal act, 4 Vic. ch. 23, secs. 20 & 28. Demurrer.—What averments necessary to bring a justification within the provisions of this act?

Trespass, for assaulting, on divers days and times, plaintiff's son.

Plea: and for a further plea in this behalf, as to the assaulting and laying hold of the said Hugh Madden, son and servant of the said plaintiff, and then seizing and laying hold of the said Hugh Madden, son and servant of the said plaintiff, as aforesaid, and then with sticks and with fists giving and striking the said Hugh Madden, son and servant as aforesaid, certain blows and strokes, the defendant saith that the plaintiff ought not to have maintained his aforesaid action thereof against him, because he says that the said defendant, at the said time when, &c., was lawfully seized in his demesne, as of fee, of a certain close, known as lot number twelve, in the third concession of the township of Thurlow, in the District of Victoria, into which said close, at the said time when, &c., the said Hugh Madden being such servant as aforesaid, with force and arms, &c., wilfully and maliciously did commit damage and spoil to and upon the said close of the defendant, and willfully broke down, damaged and injured a certain tree, to wit, one plum tree of the defendant's, there then growing and being; wherefore the said defendant, so being seized of the said close as aforesaid, quietly laid hand upon the said Hugh Madden, son and servant as aforesaid, to take and carry him before some justice of the peace of the said District of Victoria, to answer to

the premises, and to be dealt with according to law, as he lawfully might, for the cause aforesaid; whereupon the said Hugh Madden, son and servant as aforesaid, then with force and arms, &c., and with great violence, did seize and pull about the said defendant, and with force and arms, &c., did then escape and rescue himself out of the hands of the said defendant, wherefore the said defendant did then defend himself against the said Hugh Madden, son and servant as aforesaid of the said plaintiff, and endeavour to prevent the said rescue and escape of the said Hugh Madden; and in so doing did necessarily and unavoidably a little hurt, bruise and ill-treat the said Hugh Madden, son and servant as aforesaid, doing no unnecessary damage to the said Hugh Madden, on the occasion aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above complained against him; and this the defendant is ready to verify, &c.

Demurrer—for that by the mode of pleading adopted by the defendant in the said second plea, he, the defendant, has unduly attempted to confine the plaintiff to one cause of action, in respect of the trespass in the first and last counts of the declaration mentioned.

And also for that the defendant, in and by that allegation, and the course of pleading adopted by him, hath, with the rest of the matters in the said several pleas justifying the trespasses in the introductory part of that plea mentioned, therein attempted to put in issue two distinctly material and traversable facts.

And also, for that the defendant, although justifying under a criminal statute, does not state in his second plea, that he found the said Hugh Madden in the act of committing an offence against the provisions of the said statute, nor does he state or allege in the second plea, that he immediately apprehended the said Hugh Madden, or that he was forthwith taking him before some neighbouring justice of the peace, when the alleged escape was attempted; and for anything that appears in the said second plea, the said arrest and detention may have taken place long after the committal of the offence.

And also, for that the plum tree, alleged to have been injured, and for which injury the arrest and detention were made, is not stated to be of any value, or of sufficient value to bring the said Hugh Madden within the provisions of the statute.

And also, for that the damage alleged to have been done to the said plum tree by the said Hugh Madden, is not stated in the said second plea, to have been committed unlawfully and maliciously, as is required by law, in order to justify an apprehension of the offender by the owner, but merely wilfully; and the said Hugh Madden might have been acting under a fair and reasonable supposition, that he had a right to do the act complained of.

And also, for that the defendant does not justify in his said second plea, as the owner of the plum tree, but being seised of the close.

And also, for that this is an action by the master for the recovery of damages for loss of service sustained by him in consequence of an assault, battery and imprisonment, committed by the defendant on the person of the servant; that therefore the said second plea, and the matters therein set forth, form no defence to this action; that the said second plea does not in any way connect the plaintiff with the acts of the said Hugh Madden, his servant, nor does it shew that he acted by the directions or authority of the plaintiff, in the cause of the matters set forth, and which are stated as a defence by the defendant in his said second plea; that the defendant has not shewn, that the injury committed on him by the said Hugh Madden, necessarily resulted from the service in which the plaintiff had employed his servant, nor is it shewn in any manner whatever, that the alleged injury to the close or tree of the defendant, by the said Hugh Madden, was committed or attempted by the order or authority of the plaintiff, or in carrying out his directions, or by reason of or from the nature of the service in which the said Hugh Madden was employed by his master.

S. Richards, for the demurrer. *D. B. Read*, contra. The statutes and cases cited on the argument were—1 C. & M. 618; 1 Chitty Pl. 372, 459; 1 Dowl. N. S. 618; 4 & 5 Vic. ch. 26, s. 20, 28; 1 U. C. R. 18; 2 C. B. 524; 3 M. & G.

390; 1 Chitty Pl. 581; 5 M. & W. 333; 4 Bing. 428; 1 C. M. & R. 427; 4 Bing. 183; 3 U. C. R. 151; 3 Chitty, 320; 10 A. & E. 582; 6 A. & E. 661; 6 Jurist, 582; 3 P. & D. 510; 3 U. C. R. 61; 15 M. & W.; 3 N. & P. 242; 1 Salk. 407; 8 T. R. 78; 1 M. & M. 54.

ROBINSON, C. J., delivered the judgment of the court.

The declaration is clearly sufficient. The second plea which is demurred to, is evidently informal inasmuch as it justifies one assault only, when the declaration charges several; and it is bad also for the more substantial reasons, that it does not aver that the plaintiff's son was committing an offence contrary to the statute, and that he was found committing the offence at the very time that the defendant seized him; that the defendant seized him in order to take him forthwith before some neighbouring justice of the peace—all which averments were necessary to bring the case within the act, 4 & 5 Vict. ch. 26, secs. 20 & 28.

Oviatt v. Bell, decided in this court, and cited in the argument, is in point as to two of the objections.—1 U. C. R. 18.

And the plea does not describe the trespass properly, so as to bring it within the 20th clause of the statute which must have been what was intended, but states that the plaintiff's son maliciously trespassed *upon the close*, as if the act of *wilfully* breaking down a plum tree was the manner in which he trespassed *on the close*; but it is not for trespassing on the close that the statute gives the summary remedy, but for the *malicious* injury to the tree, and that is not here charged to have been maliciously done.

Per Cur.—Judgment for plaintiff on demurrer.

BANK OF BRITISH NORTH AMERICA V. SHERWOOD.

Where the defendant pleads over, and takes no exception to the declaration, the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity.

A plea that the defendant endorsed the note without consideration from the maker or the plaintiff, is bad.

Declaration: "The Bank of British North America," as endorsees of a note, against the defendant, as endorser. The declaration contained the usual averments.

Plea: That defendant endorsed the said promissory notes in the declaration mentioned, for and by way of accommodation for the said Donald Bethune, and without any value or consideration whatever from the said Donald Bethune, or plaintiffs, or any one else for his said endorsement thereof, and that there was not at any time any consideration whatever to the defendant for the said notes, or either of them, or for his said endorsement of the same, and that the said notes were delivered to the plaintiffs, and the plaintiffs now held the same, and have ever since the said endorsement thereof held the same, without any value or consideration whatever from the plaintiffs, or any other person *to the defendant*; and this defendant is ready to verify, &c.

Demurrer: That it is not averred, nor does it appear in and by the said plea, how, or under what circumstances, or for what purposes the said notes were given or endorsed. And also that the said plea ought to have stated and shewn affirmatively, how there was no consideration or value for the said endorsement. And also, for that the said plea is too general. And also, for that as the said promissory notes, and the defendant's endorsement thereof, must be taken and presumed in law to have been made for value and consideration, and as no new facts are stated, the plea ought to have concluded to the country. And also, because the said plea is bad in substance.

Phillpotts, for the demurrer. *Crooks*, contra. Cases cited:—3 Dowl. 472; 7 Wm. IV. ch. 34; 2 M. & Gr. 348; 2 Q. B. 580; 3 A. & E. 521; 1 Bing. N. S. 167.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, that the declaration in this case is sufficient, for the court cannot tell judicially that there is not a corporation named, as this is, having legal authority to sue in a corporate capacity. On that point I refer to 2 Q. B. R. 580, *Cooch et al. v. Goodman*.

We know indeed that there is or was an association, having the same name, which is by a statute of Upper Canada authorized and required to sue in the name of their managing agent; but we do not judicially know that this is the same association, and the defendant has taken no

exception to their want of capacity to sue as a corporation, but has pleaded over to the cause of action.

With regard to the plea, no doubt it is not a defence. It states only that the defendant endorsed the notes without consideration, which is the common case of accommodation indorsers.

It is not denied that the plaintiffs are holders for value: the defence set up is, that they gave no value to him. The note being an accommodation note, and endorsed for no consideration, is no defence except against the person for whose accommodation it was indorsed.

Per Cur.—Judgment for plaintiffs on demurrer.

BOOTH V. BARCLAY ET AL.

Note payable to bearer—and endorsed—endorser liable.

A. makes a note payable to B. or bearer, and delivers it to B.—B. endorses it —C., the holder sues B. on his endorsement. *Held, Per Cur.*—That upon such endorsement an action would well lie against B.

Appeal from the District Court of the Midland District.

Declaration: For that whereas the defendant Barclay, on &c., made his promissory note in writing, and thereby promised to pay one Phillip D. Booth, *or bearer*, the sum of, &c., and the same was then delivered, transferred and assigned to the defendant McLeod, who then endorsed the same to the plaintiff, and delivered the same, so endorsed, to the plaintiff; and the said Barclay did not pay the amount thereof, although the same was duly presented on the day when it became due, of all, &c., wherefore, &c.

The defendants denied the making and endorsing the note, upon which pleas issues were joined, and the plaintiff had a verdict against both defendants.

A rule was obtained in the court below to arrest the judgment as against McLeod—which rule was made absolute.

The plaintiff appealed against this decision.

McKenzie, of Kingston, for the appellant. *S. Richards*, for the respondent.—15 M. & W. 208, was cited; also, *Thew*

v. Adams, in our own court, Hil. Term, 3 Vic., and West v. Bown, 3 U. C. R. 190.

ROBINSON, C. J., delivered the judgment of the court.

It is well settled that if a person endorses a note payable to bearer, though it requires no endorsement for the purpose of transferring it, he will make himself liable to be sued as endorser; then if so I do not see that it could be necessary that he should claim by endorsement of the person named in the note as payee.

The person named in the body of a note as payee of a note, payable to him or bearer, may be a fictitious person, and therefore it cannot be held, as was decided in this court in Thew v. Adams, that any subsequent party to the note can only make title through endorsement by him, for he may be an imaginary person.

In Thew v. Adams, the note was payable to order, not to bearer, and requisite therefore to be first endorsed by the payee.

As the case is stated in this declaration, we may understand that Barclay made the note payable to Booth or bearer, and immediately handed it over himself to McLeod, when, by so taking it, he would be the legal holder of the note, and as he chose to endorse it, though he need not, he gave the note additional credit by backing it, and made himself liable to be sued as endorser.

It is our opinion, therefore, that the judgment of the District Court, in the motion to arrest the judgment, should be reversed.

Per Cur.—Judgment below reversed.

DOE DEM CHANDLER V. TESSIER.

Seven years residence of a parent (a foreigner) in this province—right of son to inherit—Statutes Geo. IV., ch. 21; 4 & 5 Vic. ch. 7; 7 Vic. ch. 42.

The plaintiff made title as son and heir of Annis Hall, daughter of Thomas Hall, who came from the United States to Upper Canada, in 1801, and continued to reside here. Annis Hall married one Chandler in the United States, and in 1804 they came into this province on a visit to Hall, her father, but soon returned to Vermont.

In 1808 Mrs. Chandler came into this province and lived with her father two years, then returned to Vermont, where she married one Stevens, and he dying, she came again to Upper Canada, in 1827, and stayed a year, then returned to Vermont, and remained there until 1829 or 1830, when she came to Upper Canada and resided here till her death, in 1841 (after February of that year).

The lessor of the plaintiff is her son, born in the United States.

Mrs. Chandler (afterwards Stevens), bought the land in question, between 1808 & 11, when living in this province. The lessor of the plaintiff was living in this province in December, 1843. The grandfather, Hall, was born a British subject in the United States before 1773; he and his wife both died in this province.

On the 9th May, 1844, the lessor of plaintiff took the oath of allegiance prescribed by 9 Vic. ch. 43.

Verdict for the plaintiff.

Phillpotts obtained a rule for a new trial, on the law and evidence. *Richards* shewed cause. The authorities and statutes referred to, were—4 & 5 Vic. ch. 7; 7 Vic. ch. 43; Co. Litt. 8 a, 129 a; 2 Bla. Com. 249, 274; Doe Patterson v. Davis, in this court.

ROBINSON, C. J., delivered the judgment of the court.

The case of the lessor of the plaintiff appears to be free from difficulty—his mother, who acquired the estate, being in this province on 10th of February, 1841, and having been resident in it for more than seven years before that day became as a natural born subject of her Majesty to all intents and purposes; and under the 3rd clause of the act, her son could inherit, so far as any impediment is necessary to be considered which might otherwise have arisen from her foreign character, and her inability to hold and to transmit real estate. Then her son, the lessor of the plaintiff, was naturalized by name, by the statute 7 Vic. ch. 43, and rendered capable of inheriting, from any time theretofore, as if he had been born within the province.

Per Cur.—Rule discharged.

KERR, ASSIGNEE OF TENNANT, V. COLEMAN.

Deed of assignment by bankrupt to one of his creditors, with a right of preference—Annexing of schedule to deed—Assignment on the face of the instrument of all bankrupt's estate to one creditor, an act of bankruptcy *per se*. *Quære*: anything short of this, such an act? Construction of our Bankrupt Act, 7 Vic. ch. 10, clauses 2 and 19, also of proviso to clause 19, and also of clauses 37 and 38, as to the necessity the act imposes upon the assignee of a bankrupt, seeking to invalidate an assignment to a particular creditor, being required to prove that the assignment was *voluntary*—in addition to its being made by the bankrupt in contemplation of bankruptcy—with the knowledge of the creditor—and for the purpose of a preference.

Semble, that a jury finding "that the assignment was executed in contemplation of bankruptcy, and that the defendant knew when he took it, that the other creditors would not be paid their debts," is sufficient to satisfy the act, and make void the assignment, without any specific direction from the judge, or finding by the jury, upon the further point of the assignment being the *voluntary* act of the bankrupt.

SULLIVAN, J., *dissentiente*.

The plaintiff sued in assumpsit on the common counts to recover money, which the defendant had received on account of Tennant, the bankrupt, from persons indebted to him.

The defendant pleaded non-assumpsit.

The bankrupt, Tennant, was in business in Paris, in the Gore District, as a merchant and miller, and in 1847, was largely indebted to Coleman, the defendant, who had advanced him money to buy wheat, for which flour was to have been delivered in return.

In July, 1847, Tennant confessed judgment to the defendant for 1300*l.*, on which the defendant was to be at liberty to enter up judgment the next day. It was not disputed that this was a just debt, being for money advanced by the defendant to the plaintiff, for which he had received no return.

One Farish had sold goods to Tennant to a large amount, and about the 10th November, 1847, took from him a confession of judgment for 1013*l.*, without a stay of proceedings; a part of which debt was paid soon afterwards; and judgment was entered and a *fi. fa.* taken out to levy the residue, 913*l.* 11*s.* 2*d.*, which *fi. fa.* was placed in the sheriff's hands on the 2nd of December, 1847. The sheriff went the next day and seized all the goods of Tennant which he could find, and these produced afterwards 669*l.* 3*s.* 7*d.*, not sufficient to satisfy the writ.

Between the sheriff's seizure and the sale of the goods, Tennant's goods being then in the sheriff's possession and his shop closed, Tennant took with him his books and securities and went to the defendant, who lived in Dundas, and executed an assignment to him, on the 13th December, under seal, of "*all his (Tennant's) book debts and accounts, particularly described and set forth in the ledger containing the same, and in the annexed schedule, to hold the same to him (Coleman), with full power to use Tennant's name in collecting the said demands.*"

And it stated in this assignment; that it was made to Coleman upon trust that he should proceed with diligence to collect the debts, in such manner as might appear to him best for all concerned; and that he should apply the money, first, in paying the expenses of collection, including remuneration to himself for his trouble as trustee, "*and his (the said Coleman's) account in full;*" secondly, that he should divide the residue ratably among his (Tennant's) other creditors.

A clerk of Coleman's who was examined on the trial, swore that when Tennant first came to Coleman, he understood he came to try and get some arrangement made respecting Farish's debt; and they went away together and returned, and talked about their affairs, when Coleman insisted on an assignment being made to him; that the assignment was first drawn, making the trust for the benefit of all the creditors indiscriminately (this alteration being interlined). The deeds shews this to have been so. They had gone to try and settle with Farish, in Hamilton, and had returned without success, and then the assignment was made.

No schedule whatever was annexed to the deed, nor did the deed in any manner shew what were the debts assigned further than by the words above quoted in the body of it.

Tennant was at that time indebted to various other creditors, some of them in a large amount.

It was not shewn that he had at that time any other property, except what the sheriff had seized; or if he had any other it was represented by himself to the sheriff,

either to belong to his landlord, or to others, in consequence of which the sheriff forebore to seize it, as he otherwise would have done, upon Farish's execution.

Immediately on executing this assignment, Tennant left Dundas, telling Coleman that he would return home and make out a statement of his affairs, to submit to his creditors; that he never returned to his home except once, secretly, two months afterwards, when he departed again secretly, and finally left the country.

A commission of bankruptcy issued against him on the 12th of February, 1848.

Coleman, the defendant, was examined before the commissioners of bankruptcy, in April following, and swore that he thought at the time that Tennant's estate would have paid 10s in the pound to the other creditors; that Tennant, on the 18th December, had been endeavoring to make an arrangement with Farish, and that his not being able to effect it, induced him to make the assignment to him (Coleman), which Coleman swore he had pressed Tennant to make to him, and which did not, as he said, include all his debts or effects. He admitted that Tennant told him, when he executed the assignment, that if he had been able to settle with Farish, *he would have gone on with his business*; that he told him he would call a meeting of his creditors, to enable him to go on with business, and that, if his affairs were to be wound up, he would propose that he (Coleman) should close them, rather than other of the creditors.

It was proved that since the assignment, Coleman had by virtue of it, collected several debts due to Tennant, and it was for these moneys the plaintiff now sued as assignee of the bankrupt Tennant.

The learned judge told the jury that there was no doubt that the defendant was honestly *a creditor* of Tennant's for the amount claimed by him—that the plaintiff could only be allowed to recover, on their being satisfied that the defendant took the assignment of those debts after he had notice of an act of bankruptcy or that it was not made to him in good faith.

The learned judge explained that he said this, in reference to the 19th clause of our Bankrupt Act, and that his opinion was, that if the defendant, at the time of his taking the assignment, was convinced from his knowledge of Tennant's circumstances, that the other creditors of Tennant would be injured by it, as being thereby prevented from receiving their debts; then the assignment could not be held to be a *bona fide* transaction within the exception at the end of the 19th clause—and it would be void under the first part of that clause.

He then called the attention of the jury to the 37th and 38th clauses of the same statute, and explained to them that if Tennant, when he made this assignment, knew that there were other creditors of his yet unpaid, whom he was thereby leaving without the means of obtaining payment, he considered that that would be giving a fraudulent preference to the defendant Coleman, which would make the assignment void, under the provisions of the statute.

The plaintiff's counsel had objected that the assignment was inoperative, and could transfer nothing for want of any schedule being attached to it, such as was referred to in it, without which it could not be known what debts were assigned.

The jury gave a verdict for the amount which the defendant was proved to have received on account of Tennant, from his debtors, and they added, that they were of opinion that the assignment was made by Tennant in contemplation of bankruptcy—and that the defendant Coleman, received it knowing that the other creditors would not be paid their debts.

Verdict for the plaintiff, 88*l.* damages.

Blake, Solicitor-General, obtained a rule for a new trial, on the law and evidence, and for misdirection. *Freeman*, of Hamilton, shewed cause. The cases cited on the argument were—*Roscoe*, N. P. 537, 549; M. & W. 47: 14 E. R. 568; 5 Bing. 369; 9 Bing. 107, which was compared with *Moo. & Malk.* 137; 7 E. R. 544; C. M. & R. 777; 5 Taunt. 539; 3 M. & Gr. 158; 2 Bing. N. C. 444; 5 M. & Gr. 329; 11 E. R. 256: 1 M. & W. 714; 4 Q. B. 674; the

statutes referred to were—7 Vic. ch. 10, sec. 2, 19, 37, 38; 6 Geo. IV. ch. 19, 81—Imperial Act.

ROBINSON, C. J.—I am inclined to think that the plaintiff was entitled to succeed at the trial, on the single ground, which is independent of the bankrupt law, that the deed transferred nothing for want of a schedule. “*All his book debts and accounts particularly described and set forth in the ledger containing the same, and in the annexed schedule,*” seems to me, to mean all such of the accounts, in the ledger, as are set forth in an annexed schedule. Both requisites must concur—no debt, not appearing in the ledger, would be transferred; and on the other hand, if the ledger contained 50 accounts of debts, and the schedule should specify but 10 of those 50, it is my opinion, at present, that those 10 only, and no others, would pass by the assignment.

It may, however, be more reasonable to consider the reference to the schedule as intended to be matter of cumulative description, rather than as restrictive: in other words, that the grantor meant all the debts in his ledger, proposing to enumerate them in a schedule, but afterwards omitted to do so, in which case we are to look for them in the ledger.

If there had been a schedule, however, annexed to the deed, and that had contained only some of the debts in the ledger, and not others, I should take it, that those not in the schedule would not pass.

It may be, that the parties meant that all the debts in the ledger were to pass, and other debts besides, which were not in the ledger, and which were intended to be specified in a schedule; in which case no schedule being added, the debts in the ledger only would pass by the assignment.

In a deed, greater certainty is generally required than in a will, where a liberal construction is applied, rather than a testator shall be held to have died intestate as to any part of his property, when it was evidently his intention to dispose of all. Words are held more strictly to their meaning in deeds. I am glad that we are not under the necessity of determining this question, for I think it a nice point; and if we were to discard parol evidence, we might find it difficult to satisfy ourselves what was meant, and might have

on that account, to treat the description as imperfect, and the deed therefore void; though considering the facts proved; I suppose the parties did mean that Coleman should collect all the debts, as well those not in the ledger as those that were, and that it was intended to specify the latter in a schedule, in which case the omission would not prevent the debts in the ledger from passing.

The case of *Weeks v. Millardet*, 14 E. R. 574, has a strong bearing against the position that the bill of sale in this case, can be treated as valid and operative without the schedule.

But upon the case generally, I cannot bring myself to entertain any doubt, for I take it to be one in which it is to little purpose to scan critically, the charge which it may have seemed right to the learned judge to give to the jury at the conclusion of the trial, since it is impossible, in my opinion that any other verdict than that which was given, could have been supported upon a view of *the facts proved*.

There have been decisions in England, which the judges have looked upon as irreconcilable with each other, upon both the points, i. e. when a man may be held to have acted *in contemplation of bankruptcy*, and when he may be held to have given *a voluntary preference*. But I think from the case of *Alderson et al. v. Temple*, 4 Burr. 2235, downwards, there has been no decision, on the authority of which this assignment could be upheld.

In England, the objection that a voluntary preference of one creditor is a fraud on the Bankrupt Acts, rests on principles of the common law; and the clearness with which the considerations affecting the question are stated in *Alderson v. Temple*, shew in a striking light, how great was the advantage to jurisprudence, when any occasion arose for calling for an exposition from Lord Mansfield, of the principles which should govern commercial transactions and the application of them: I refer beside to the case of *Newton v. Chantler*, 7 E. R. 144; of *Thorton et al. v. Hargreaves et al.* 7 E. R. 544; *Bevan v. Nunn*, 9 Bing. 107; *Morgan et al. v. Brundrett*, 5 B. & Ad. 289; *Ridley et al. v. Gyde*, 9 Bing. 349; *Cooke v. Rogers*, 7 Bing. 438; *Siebert et al. v.*

Spooner, 1 M. & W. 714 ; Curr v. Smith, 5 Q. B. Rep. 125 ; 4 Scott, 137 ; 1 Car & K.

The decision, in all these cases, was not in favor of the assignee under the commission, but the principles maintained in all of them, appear to me to be utterly inconsistent with the possibility of upholding this assignment, independent of any statutory provision.

Then when we look at our statute, it certainly gives no aid to an assignment made under such circumstances, but much to the contrary, for it enacts (if I may say so) the common law principle affirmed by the English decisions, and provides (19 cl.), "that all transfer of property made by any trader in contemplation of bankruptcy, and for the purpose of giving to any creditor a preference or priority over the general creditors of such bankrupt, shall be deemed utterly void and a fraud under the act."

The proviso in the same clause, "that all dealings and transactions by and with the bankrupt *bona fide*, entered into more than 30 days before the issuing of the commission against him, shall not be invalidated or affected by this act," does not, in my opinion, relate to transfer of property made in contemplation of bankruptcy, and *for the purpose of giving* a preference to a creditor, because these are expressly prohibited and declared fraudulent, and can not be held in the face of that prohibition to have been *bona fide*, upon the pretence that the creditor thus favored, did not know of bankruptcy being contemplated, or that the assignment was urged by him, and so was not voluntary.

The 37th and 38th clauses do not, I think, affect this question ; first, because, for the reason I have given, this cannot be looked upon as a *bona fide* conveyance or transaction, which it must be, in order to come under either of those clauses ; and 2ndly, because the evident intention of those clauses, is to prevent the injustice which might arise from referring back to an act of bankruptcy not known to the other party. This is not a question about the overreaching effect of an act of bankruptcy.

Our statute speaks only of intention to give a preference, and making that fraudulent, without expressly requiring

that, in order to make it fraudulent, it must be voluntary. If, however, we adopt the construction that it must be voluntary, as applying not only to the procuring goods to be taken in execution, but to assignments also, it must be (as I have in the late case of *Brent v. Perry* ventured to intimate) by holding that the words "*for the purpose of giving preference*," involve it; and under the idea, that what a man does under pressure of another, he cannot properly be said to do for any purpose of his own.

Without at present binding myself to an opinion upon the soundness of such a construction, as applied to securities and assignments, and to what extent it may be carried, I will say that even grounding nothing upon the express enactment in our statute, and its unqualified terms, there was still, in my opinion, no room for the jury to hesitate in pronouncing this assignment, a fraud upon the general object of the bankrupt law.

A trader, all whose goods appear to have been taken in execution, and which, when sold, have produced no surplus beyond that execution, but fall far short of satisfying it, leaves his place of business locked up, and all in the hands of the sheriff, and takes his books to another creditor, tells him of his difficulties, urges him to help him if possible, to effect some arrangement of the execution which may prevent "*his winding up*," as he says; and when he finds he cannot succeed, he makes an assignment of all his debts in his ledger (which assignment must either have transferred them all, or can have passed nothing), telling him he would rather he should have the winding up his affairs than any other creditor, and then he absconds, never returning to the country from that moment, except once by stealth. There is no proof whatever, that the bankrupt, after all his goods had been seized by Farish, had anything in the world to satisfy his other creditors but the debts due to him, nor any proof that he had other debts, besides those which the assignment would cover. He therefore, so far as could be seen at the trial, was thereby divesting himself of every thing in favour of one creditor, with his shop shut up, and when he was on the eve of absconding.

The circumstance, if such had been proved, of his having some small property besides, to which his other creditors could look—or of his having been asked by Coleman, after he came to him with his books, to make the assignment, would not avail to give it validity.

There have been several decisions in England on both points. He took the initiative by going to this favoured creditor with his only remaining property, so far as we know, and evidently for the purpose of doing what he did. That he did not do it under any rational notion of the effect of pressure, is clear, for he did not better himself in the least by it. On the contrary, he ran away directly after it, as if conscious that he could not face his creditors, and sustain himself in business, after what he had done, for it was unjust in reality, as well as in appearance, to put all in the power of one creditor, just as he was taking flight—not to make that creditor a trustee for the benefit of others, but to place him in a situation to pay himself first in full, and leave others to their chance of a residue.

There never can have been a clearer case of contrivance to interrupt the fair operation of the bankrupt laws, not merely by the debtor in contemplation of immediate bankruptcy selecting his own trustee, instead of leaving his estate to be taken charge of, and distributed under the law, but by enabling that trustee to act exclusively for his own benefit, till he was satisfied, though nothing might be left for the other creditors.

It is not to be forgotten, that Tennant seems to have at first desired that Coleman should collect the debts for the common benefit of all, and perhaps he urged it, and reluctantly consented to the arrangement in its present shape, but in the first place, it was he who made the first move—he went to Coleman, not Coleman to him; and in the next place, if he seriously felt that all his creditors should be dealt by equally, why should he not have refused the assignment on any other terms?

There is no evidence of any threats, or of anything that he was to apprehend; he had no more goods to be seized; his book debts could not have been taken by Coleman, and

he could have been no worse off without making the assignment, than he was after he had made it. Coleman had already a confession of judgment for his debt, on which he could proceed at any time. Mr. Coleman's debt was for money advanced, and was no doubt a perfectly meritorious claim, and there is no imputation upon him, for choosing to secure himself by any assignment which his debtor would consent to make; but we cannot say that his debt was more just than all other just debts, so as to stand on any preferable ground in the estimation of the law.

It is quite clear, that even if our statute had contained no such prohibition as the 19th clause, still if Tennant, contemplating bankruptcy, as the jury expressly found he did, had voluntarily taken 1,000*l.* in money to Coleman, on the day when he made this assignment and paid him his debt, such voluntary payment must have been held fraudulent, on the principles of the English decisions, and the assignee could have made Coleman refund the money, although he may have known nothing of Tennant's insolvent circumstances. Then that being so, when our statute in the 19th clause expressly prohibits such assignments as was made in this case, if made in contemplation of bankruptcy, and for the purpose of preferring a creditor, I could never venture to hold, so long as that clause remains unaltered, that Tennant, contemplating bankruptcy, could go and hunt up one of his creditors, and make an assignment of his debts to him for the very purpose, expressed in the instrument itself, of paying him in full, before any creditor should receive anything. They were both laying their heads together, with a deliberate knowledge of the facts, to defeat the bankrupt law, and intercept its just and equal operation.

It is no excuse for one of the two so combining to defeat the law, with a full knowledge that they were defeating it, to say that the other asked him to do so.

The language of Tindal, C. J., in *Green v. Perry*, 1 C. & K., 449, is wholly irreconcilable with such an idea, though in the report there is some confusion, for the learned judge is made to speak of one party in the transaction, when he evidently meant another.

I cannot bring myself to determine, that a debtor, making an assignment of his effects while contemplating bankruptcy, *to one creditor, for the purpose of securing to that creditor payment in full*, and with a trust to divide only the surplus among the other creditors, can be said not to have made an assignment in contemplation of bankruptcy, *for the purpose of preferring that creditor*, upon the ground that such creditor asked him to do it, the debtor having himself taken the initiative in the arrangement—there being no evidence of any pressure of that description (if, indeed, of any pressure whatever), which could be supposed to account for his having done anything that he was himself unwilling to do.

The evidence admitted, I think, of no other verdict than was given, and any other trial on the same evidence could have no other result, unless the bankrupt laws are to be wholly disregarded. It is not alleged that the state of things can be made to appear differently on another trial, and therefore the rule should, in my opinion be discharged.

MACAULAY, J.—I think the assignment sufficient to pass the book debts and accounts in question, by reference to the ledger, in which they are said to be particularly described and set forth, although no schedule was annexed, as in the assignment is alleged.

As to the construction of the Bankrupt Act. The imperial statute 6 Geo. IV. chap. 16, sec. 3, and the provincial statute 7 Vic. chap. 10, sec. 2, declaring what shall constitute acts of bankruptcy, are in some respects differently worded. The imperial statute enacts that if any trader shall make any fraudulent gift, delivery, or transfer, of any of his goods or chattels, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy. The imperial statute mentions only goods or chattels, and adds, with intent to defeat or delay creditors. The provincial statute enumerates moneys, goods, chattels effects, assets, and credits, &c., but omits the intent to defeat or delay creditors. The imperial statute contains no mention of assignments in contemplation of bankruptcy. The 19th section of the provincial statute de-

declares them fraudulent and void, and the courts in England have decided, that as being contrary to the policy of the bankrupt laws, voluntary payments or assignments of goods, &c., made in contemplation of bankruptcy, are void, and acts of bankruptcy under section 3 of the imperial act. The provincial statute, sec. 19, declaring all payments or conveyances, transfers, &c., made or given in contemplations of bankruptcy, void, does not use the word voluntary, which enters into the definition of the rule laid down in England; but it adds, "or for the purpose of giving any creditor any preference or priority over the general creditors." This, in the English cases, seems to be considered a necessary consequence of their being made in contemplation of bankruptcy and voluntarily by the debtor.

Mr. Eden, page 25, says, an assignment of part of a trader's effects to a particular creditor (unlike in this respect to an assignment of the whole) carries with it no intrinsic evidence of fraud, &c. But when such act is done in contemplation of bankruptcy, and *consequently* with the intent to give the grantee a preference over the other creditors, it is contrary to the spirit and policy of the bankrupt laws; and it is not only void, but an act of bankruptcy, such fraudulent preference in England, being an act of bankruptcy, under sec. 3 of the imperial act. An assignment within sec. 19 of the provincial statute (being not only void, but a fraud under the act), would seem equally to constitute an act of bankruptcy here under sec. 3 of our act.

When payments or assignments, &c., are made voluntarily and in contemplation of bankruptcy, they must be so made for the purpose of giving a preference over the general creditors; and that such was the object and intent of the assignment in question, is expressed upon the face of it, declaring the trusts on which it was given. The difficulty is, whether to constitute an assignment void and a fraud under the statute, the 19th section means that it must be voluntary on the part of the debtor, to render it in contemplation of bankruptcy, for the purpose of giving a preference, &c., within the meaning of that clause; whether, though

manifestly giving a preference in its effect, or even though so intended, or declared on the face of the assignment, it nevertheless forms a collateral question, whether it was so given voluntarily, or whether such preference was not gained by the creditor, by pressure, &c., and *bona fide*, although he may have known that the other creditors would not be paid.

The grounds relied upon in support of the present rule are—1st. That the defendant being a *bona fide* creditor of the bankrupt, the latter had a legal right to give him a preference to other creditors, irrespective of the bankrupt laws, wherefore it would not come within the 2nd section as an act of bankruptcy.

2ndly. That although not expressed in the 19th section : an assignment to be void under it, must be shewn to be *voluntary* and in contemplation of bankruptcy, &c., and that on this point the evidence was not left to the jury with correct instructions from the bench.

3rdly. That even if shewn to have been originally within the 19th section, still being (irrespective thereof) good and valid, and the commission not having issued till after the expiration of 30 days, the assignment was confirmed by lapse of time, under the proviso in sec. 19 and sec. 37.

If the assignment was originally liable to be impeached, as made in contemplation of bankruptcy, &c., under sec. 19, I do not think it became valid at the expiration of 30 days. Both the provisoes in sec. 19 and sec. 37, speak only of transactions *bona fide* made and entered into by and with the bankrupt; and if this was originally invalid by the express provisions of the former statute, I do not think the proviso can be construed to extend a healing efficacy, to make good by lapse of time, that which was originally void and a fraud under the act (1 H. B. 65 ; 6 A. & E. 943) even although, irrespective of the bankrupt law, it might as against other creditors of Tennant, be looked upon as *bona fide* and for valuable consideration, and therefore valid, notwithstanding the preference given to the defendant thereby.

The case of *Tucker v. Barron*, 1 M. & W. 137, and 3,

C. & P. 85, in which Lord Tenterden held that the doctrine of fraudulent preference, in payments only, applied to cases *within* two months of the commissions under 6 Geo. IV. ch. 16, sec. 1, was virtually overruled in *Beven v. Nunn*, 9 Bing. 107, which is more like the present case; and where it was held that a transfer of goods, in satisfaction of a *bona fide* debt, made voluntarily and in contemplation of bankruptcy, was not protected by that section, though made more than two months before the commission issued, being in itself an act of bankruptcy and void *ab initio*.—*Baxter v. Pritchard*, 1 A. & E. 456; *Pearson v. Graham*, 6 A. & E. 898; 9 B. & C. 45; *Sharpe v. Thomas*, 6 Bing. 416; 1 M. & W. 497.

Hall, Assignee, v. Wallace, 7 M. & W. 353, where Baron Parke, speaking of the effect of a trader procuring his goods to be taken in execution upon judgments in themselves perfectly valid, and of the saving effect of the statute 2 and 3 Vic. ch. 29, said, all the legislature meant by that act was to prevent transactions, which otherwise were valid, from being invalidated by a prior act of bankruptcy; but that there the transaction was invalid in itself, and thereupon void; and that it was a parallel case to the delivery of goods by way of fraudulent preference, in contemplation of bankruptcy, which was invalid as against the assignees, although the party receiving them might not be cognizant of the dishonest intention of the bankrupt. Alderson, Baron, said, acts which are invalid in themselves do not require invalidating, and that the execution itself was invalid, being in the nature of a fraudulent preference.—12 M. & W. 102.

Although sec. 2 of our act does not, like sec. 3 of the imperial statute, speak of an intent to delay creditors, it appears to me, it is equivalent in fact, for I do not perceive any solid distinction between an assignment fraudulent under sec. 2 of the one act, and fraudulent with intent to defeat or delay, as under sec. 3 of the other.

To be fraudulent under either, the assignment must be equally made with such intent, which in the one is expressed and in the other understood; both mean assignments fraudulent and void, as against creditors at common law, or under the act 13 Eliz. ch. 5, to which had been added, by

construction in England, and by express enactment here, acts of fraudulent preference; and I look upon an assignment or act fraudulent and void under sec. 19, an act of bankruptcy under sec. 2, in like manner as an act of fraudulent preference is deemed an act of bankruptcy under the imperial statute. Assignments therefore utterly void and a fraud under the provincial act, by section 19, are also fraudulent under sec. 2, and are not cured by reason of their preceding by 30 days, the date of issue of the commission of bankruptcy.

Before such an assignment can be impeached, of course there must have been a commission of bankruptcy issued and assignees appointed, but when appointed and the transaction invalidated as fraudulent and void, it is void *ab initio*—the property assigned remains as if no such assignment had been made, and the right and title of the assignees attach accordingly. If, therefore, the present assignment is involved under sec. 19, it follows that the plaintiffs are entitled to recover from the defendant, all money that he may have received under it, as being in law received to their use as such assignees, and I do not think that the question of relation, or the objects, or necessity in the proviso in sec. 19 or sec. 37, on that head, materially affects the case. They may have been adopted *ex abundanti*.

This disposes of the third ground. As to the first and second—the first may be conceded: the second is the material one upon which a question of general construction is raised—that I should not be disposed unnecessarily to express an opinion upon.

There is much force in the argument, and in the cases, to shew that to render an act in contemplation of bankruptcy, and for the purpose of giving a preference, void under sec. 19, such act should be voluntary on the part of the bankrupt within the meaning of the English decisions, and I doubt not, that cases may arise in which the consideration, how far it was voluntary, would become very material.

Of the later decision on this head I may mention—*Aldred v. Constable*, 4 Q. B. 674; *Cook v. Pritchard*, 5 M. & G. 329, and 1 C. & K. 449, and others to which they refer,

and which shew that preference on the part of the creditor outweighing the debtor's own inclinations, and inducing him to pay a grant or security against his will, in consequence of such pressure or importunity, is evidence to rebut the inference of its being voluntary, within the meaning of the rule, as to fraudulent preference. The circumstances, however, generally constitute only matter proper for the consideration of a jury.

Assuming, however, that an assignment cannot be made in contemplation of bankruptcy, and for the purpose of giving an undue preference under sec. 19, unless it is voluntary and not obtained by pressure, &c., within the cases—still I think the present verdict correct, and that the jury must be taken to have virtually, though not literally, so found.

The effect of pressure, &c., as evidence to rebut the inference of fraudulent preference, was not particularly noticed or explained to the jury, by the learned judge at the trial; but he did make many observations touching the bearing of the evidence of the *bona fides* of the transaction, as respected both the bankrupt and the defendant, extending to the question of collusion between them to prejudice the general creditors, and the jury found that the assignment was made in contemplation of bankruptcy, on sufficient evidence; also that the defendant received it knowing that the other creditors would not be paid their debts—and that it was intended to give the defendant a preference over the general creditors, is apparent on the face of it.

Under these circumstances, as given in evidence, I apprehend the assignment must be looked upon as against the policy of the bankrupt law and a fraud upon the act, and so void, even though not strictly within sec. 19.—Cow. 629.

The Chief Justice has fully stated the facts, and I shall not repeat them, but it seems to me that the only just inference from them is, that the assignment was voluntary, within the spirit and meaning of the English authorities. In one sense, every deed, to be valid, must be voluntary on the part of the person executing the same—this is, freely made without duress, &c. In this sense the present assignment was voluntary and binding on the bankrupt, as being his deed.

The ulterior question is, whether it was also voluntary on his part as an undue preference. That it was intended to give a preference is expressed on the face of the instrument, being in trust to pay the defendant himself in full, a debt, the amount of which is not specified, and to divide the surplus among the other creditors. But if it be competent to the defendant to shew that, although a preference is thus declared on the face of the deed, it was not voluntarily given by the bankrupt, which I very much question, I think the circumstances do not warrant such a conclusion, even although it was not quite spontaneous and volunteered on the defendant's part. He was largely indebted at the time. The principal part, if not all his goods, were under execution, for an amount exceeding their proceeds when afterwards sold. The credits assigned to the defendant, if not the whole residue, were no doubt the principal part of his resources. He repaired with his ledger voluntarily to the defendant: it may have been to shew his ways and means, and to induce him to intercede with other creditors, which he did, but ineffectually. We do not see that any other available means were exhibited or offered to the defendant, or the other creditors, or that the debtor had any, exclusive of the goods under seizure, or such property as might have been in the mill liable to be distrained for rent. The application to the creditors failed; and then being requested (it may be, pressed) by the defendant, he assigned to him what the evidence tends to shew was the whole or principal part of his unencumbered means. Then, did he do this voluntarily, or was he constrained to it by the defendant? There is evidence that he hesitated, and at first, expressed a wish that all his creditors should share alike, but that he was ultimately over-persuaded by the defendant to do what? Surely to give him that which the defendant pressed for, namely, to give him a preference. In doing so, was he exercising his own free will and discretion, taking the course to which he eventually made up his mind, or was he acting against his own inclination, and only under an undue overpowering influence of the defendant. I think the former very evident. He went of his own accord to the

defendant, apprised him of the state of his affairs, solicited his intercession with other creditors, which proved ineffectual. His business was stopped, his goods and chattels were under levy and his shop shut up, and he himself in a state of helpless insolvency, when he made the defendant his sole trustee of all his book-debts, accounts, &c., which executions against him could not have reached; the object of the trust being that the defendant should first pay himself out of the fruits, a debt not specified, but being a sum probably not likely to be realized, having nothing likely to become available for the general creditors. This, was too, a transaction out of the usual course of business (Cowp. 117), in desperate circumstances, without any relief to the bankrupt, or any object or purpose beneficial to himself to be served, but exhausting his remaining resources, placing him in such a position, that he forthwith absconded to avoid his other creditors. How a jury could have found this otherwise than an assignment, made, not only in contemplation of bankruptcy (which was in fact impending), and for the purpose, which it manifests on the face of it, viz., a preference over the general creditors, I do not see. A verdict affirming it as valid, would have been most probably set aside.—7 Ea. 544,

Seeing then that the verdict was correct, I do not think a new trial should be granted, to submit it to another jury as a case doubtful on the evidence, where a verdict for the defendant could not be deemed satisfactory.

Linton, Assignee, v. Bartlett, 3 Wils. 47.—A trader in insolvent circumstances, assigns one-third of all his effects to his brother for a loan of 120*l.*, and within two days absconds. Held, a fraud on the bankrupt law, and void.—See the judgment of the court in this case.

Compton, Assignee, v. Bedford, 1 W. B. 362.—An assignment of all except a trifle of a man's stock in trade, in favor of a particular creditor, just before an act of bankruptcy, held fraudulent and void. Stress was laid on the fact that the assignment created an insolvency, and put an end to the bankrupt's power of trading for the future.

Wilson v. Day, 1 Burr. 467, 2 Burr. 827.—To the same

effect. All the debtor's effects were assigned. Stress is laid upon the fact of the assignment being made to *prefer* one creditor to the other.—Douglas, 86-9; Singleton, Assignee, v. Butler, 2 B. & P. 283, 583; Morgan, Assignee. v. Horseman, 3 Taunt. 241; 5 Taunt. 539; Fidgeon v. Sharpe, 1 Mars. 186; Newton v. Chantler, and cases cited, 7 East. 138; Pulling v. Tucker, 4 B. & A. 382; Pearsons, Assignee of Graham v. Graham, 6 A. & E. 899; Harman v. Fisher, Cop. 117, 629, 630; where the act was voluntarily and professedly intended to give a preference, and much stress was laid upon the declared intent to give a preference, which the law did not allow.

It is not a matter of course, to grant a new trial for misdirection, if the charge was substantially correct, and the verdict is satisfactory on the evidence. The English decisions shew, that to relieve a case from the imputation of a voluntary preference, there must be no collusion, but a *bona fide* pressure on the part of the creditor, operating as the inducement upon the debtor; but that if both are aware of the impending bankruptcy, and the object is to grant a preference on the eve of bankruptcy, though requested by the creditor, and reluctantly granted by the debtor, it is fraudulent and void, as against the policy of the bankrupt laws. The present does not seem to me to be a case of pressure, within the spirit and meaning of the cases, but of voluntary and unwarrantable preference on the eve of bankruptcy, proceeding from the debtor's own free will, without any expectation of relief or advantage to himself, or with any other view or object than to give an undue preference. What other motive or object had he, other than that which the deed itself declares? I can perceive none.

Upon the best consideration I have been able to give the case, I feel bound to uphold the present verdict, and if this suit is proceeding in an amicable spirit to try the right—as stated in the course of the argument—it has been determined by the jury, and I think correctly, in favor of the plaintiff.

2 D. & R. 310; 4 Bing. 22; 6 M. & Gr. 895; 1 Q. B. 52. See 4, Chitty Pre. of Law, 40, as to granting new trials for misdirection, or omissions in the direction.

McLEAN, J.—On the trial, I told the jury that there seemed to be no reason to impeach the assignment for the want of sufficient consideration; that a debt of the defendant from Tennant appeared clearly to be due, but that if the defendant at the time he received the assignment, was convinced in his own mind that the other creditors of Tennant would be injuriously affected, and prevented receiving their debts, by the assignment to him, such conviction arising from a knowledge of the circumstances of Tennant, then, in my opinion, the assignment was not such as in contemplation of the statute relating to bankrupts, 19th sec., could be considered as *made and entered into in good faith*, and if not in good faith, that it would not be protected by the proviso in that section, but would be void. That in this case, if Tennant, instead of giving the defendant an assignment of debts, had paid him in cash the amount of his demand, leaving other creditors wholly unpaid, and no means to pay them, such payment would in my opinion, be considered a fraudulent preference, and, as such, void.

The jury found a verdict for plaintiff, and £88 damages, the amount proved to have been collected by the defendant of debts due to Tennant; and in giving in their verdict, they stated that they found that the assignment to the defendant was given by Tennant in contemplation of bankruptcy, and that the defendant received it, knowing that the other creditors would not be paid their debts.

The counsel for the defendant contended, that though the assignment might have been made by Tennant in contemplation of bankruptcy, yet it appeared by the evidence, that it was made not voluntarily, but at the pressing request of the defendant, and therefore that it was good, and that the objection that there was no schedule of debts attached to the assignment, could not prevail, because the debts contained in the booke were referred to, and the books would establish what these debts were.

If it was necessary on the trial to leave the question to the jury, whether the assignment made to the defendant was voluntary or not, and not merely whether it was made *bona fide*, and without knowledge on the part of the defendant

that Tennant must inevitably become a bankrupt, and that the assignment was executed by him in contemplation of bankruptcy, I am ready to concur in granting a new trial, because I do not think the voluntariness of the transaction, was left to them so clearly as it might have been.

They have found that Tennant executed the assignment in contemplation of bankruptcy, and that the defendant knew when he took it, that the other creditors would not be paid their debts. The assignment on the face of it, shews that the defendant was to have a preference in the payment of his debt, so that there can be no doubt of the purpose for which it was executed; and I have no doubt that under the 19th section of the Bankrupt Act, it must be considered as fraudulent, unless it can be sustained as procured by pressure on the part of the defendant, or as a *bona fide* transaction made and entered into more than thirty days before the issuing of the commission against Tennant.

The second clause of the statute declares that any "trader who shall make or cause to be made within this province, any *fraudulent* grant or conveyance of any of his lands, household goods, chattels, or any effects or assets, or of his credits or evidences of debt, shall be deemed to have thereby committed an act of bankruptcy;" and the 19th, section enacts, that "all payments, securities, conveyances, or transfers of property, or agreements made or given by any trader in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt shall be deemed utterly void, and a fraud under this act;" so that the assignment made by Tennant, which by the 19th section is declared to be fraudulent, was in itself an act of bankruptcy.

I do not think any possible advantage can be gained by the defendant from a new trial, if one should be given. The evidence is such that, as it appears to me, the transaction cannot possibly be sustained. Indeed, by the finding of the jury it is established, that it was not entered into *bona fide* by defendant without knowledge of Tennant's insolvency and approaching bankruptcy.

The defendant was aware that all Tennant's property was under seizure, and to be sold by the sheriff. He was also aware that Tennant could not pay his creditors; for had he considered him in circumstances to do so, there could have been no reason for his asking for a preference in the assignment, nor, in fact, for his taking the assignment at all. The taking of such assignment must therefore have been to defeat the operation of the bankrupt law, and to secure to the defendant an advantage over the other creditors of Tennant. If such a transaction can be regarded as entered into *bona fide* and binding, then the bankrupt law, which is intended to secure equal advantages to all creditors, may as well be repealed, as it must be useless for the object intended.

It was stated by a witness for the defendant, that when Tennant left defendant at Dundas, he was desired by him to return to Paris to arrange his affairs, and to make out a statement, to be shewn to his creditors. This seems to me to cast a strong suspicion on the whole case. When all his effects were in the sheriff's hands, and insufficient to pay the execution against him, and his books and evidences of debt were assigned to and left with the defendant, what affairs could he possibly have to arrange at Paris, and how could he make out any statement to show to his creditors? It seems almost a mockery to have given any such directions under such circumstances.

SULLIVAN, J.—The first point upon which I feel it necessary to satisfy myself, is as to the doctrine of relation back of the title of the assignees, to the first act of bankruptcy. I desire to see whether the law is different from that of England. This enquiry I find to be necessary, for the purpose of placing a proper construction upon the provisoes and enactments of the provincial statute, in which reference is made and importance given to the knowledge, or absence of knowledge, on the part of persons dealing with a trader of a prior act of bankruptcy.

The doctrine of relation in England was, before the statute 6 Geo. IV. ch. 16, founded on the express words of the 13 El. ch. 5, which authorizes the commissioners of bankrupts to assign all lands, &c., of the bankrupt before his bankruptcy

(which means the act of bankruptcy); and the statute makes the assignment good against the bankrupt, and all persons claiming under him by conveyance *since* the act of bankruptcy. The stat. 1st Jas. I. ch. 15, sec. 5, contains an enactment of the same.

Thus a relation back of the title of the assignees to the first act of bankruptcy, was given by positive enactment; and this doctrine, found so oppressive and unjust in numerous cases, was not founded upon mere construction or policy of law, and it gave rise to and made necessary the numerous provisions in force, of persons dealing with traders who had committed secret acts of bankruptcy, which have been introduced into the subsequent acts upon the subject, and in which so much is made to depend upon the knowledge of the person dealing with the trader, that he was in fact dealing with a bankrupt, that is to say, with one who had committed an act of bankruptcy.

The statute 6 Geo. IV. ch. 16, repealing all former acts respecting bankrupts for the purpose of amending and consolidating the law.—by the 12th section gives the commissioners power and authority to take such order and direction, with the body of such bankrupt, as also with all his lands, tenements, and hereditaments, &c., which he shall have in his own right *before he became bankrupt*; as also with all such interest in any lands which the bankrupt may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize and debts, wheresoever they shall be found or known, and to make sale thereof in the *manner hereinafter mentioned*.

The 73rd and 74th sections provide for the assignment of these to assignees, describing them in the following terms: "all the present and future personal estate of such bankrupt, and all property which he (i. e. he being bankrupt) may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate, and all debts due or to be due to the bankrupt, and such assignment shall vest the property, right and interest in such debts in such assignees; and after such assignment, neither the bankrupt nor any person *claiming*

under him, shall have power to recover the same." The 74th section relates to *conveyances* of real estate, and enacts that "every such deed (of the commissioners) shall be valid against the bankrupt, and against all persons claiming under him."

These sections certainly do not mean that the assignments and conveyances shall be good against all claiming under the person who become bankrupt, before he became bankrupt or committed the act of bankruptcy. They do not mean merely before the assignment, and they must therefore mean, claiming under the bankrupt while a bankrupt; and no one can read the statute 6 Geo. IV. secs. 5, 10, 11, 19, or the acts which that statute repealed, without seeing that by these acts, a trader was a bankrupt from the time of his committing the first act of bankruptcy, and was therefore incapable of dealing with his property—nor but that the title of the assignees, unless prevented by some particular proviso, referred to the first act of bankruptcy.

Therefore it would follow, that the relation back of the title of the assignees made all the provisos necessary, which made valid *bona fide* transactions without notice of an act of bankruptcy; and it would seem to follow, that as an act of bankruptcy could not affect another transaction in any way, as it produced in itself no necessity in the trader to manage his own affairs, notice of such act could have no influence or effect in making that legal which was not in itself illegal.

On examining carefully the Canadian statute 7 Vic. c. 10, I do not find any enactment or provision, shewing that it was the intention of the legislature to make the trader a bankrupt from the time of the act of bankruptcy, or to give the assignees title by relation to that act; on the contrary, when an act of bankruptcy is complained of and established, a commission issues, by which the sheriff is commanded to take and keep the effects of the trader until the appointment of assignees; and the instrument by which the assignees are appointed, is declared to vest in them all the property, both real and personal, which he could in any way have lawfully sold, assigned or conveyed, or which might

have been taken in execution against him, *at the date of the commission* (not at or before the act of bankruptcy); and the same section proceeds to enact, that the assignees shall have the like remedy to recover the said effects, as the bankrupt might have had if no commission issued against him.

This language of the provincial act, and many other expressions therein contained, point, as it appears to me, distinctly to the date of the commission, as the time at which the acts and estate of the bankrupt are first affected by the bankrupt laws, so as to make acts, not made void by positive enactment, ineffectual. The saving clauses so necessary in the English acts to protect *bona fide* transactions with traders who had committed previous secret acts of bankruptcy, are altogether uncalled for and unnecessary: nevertheless some of these have been introduced, for example, the 37th & 38th sections, and the sub-proviso to the 19th section; the introduction of these unnecessary clauses, has led to some obscurity in the construction of the act, and it has been, in the case before us, argued from these clauses, that as they are not required to protect innocent and *bona fide* transactions after an act of bankruptcy, they must be held, and particularly the proviso to the 19th section, as protecting transactions declared fraudulent and void under the clause itself.

By the 19th section it is enacted, that all payments, securities, conveyances, transfers of property or agreements made or given in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, shall be deemed utterly null and void, and a fraud under this act.

So far the distinction between the English acts and the provincial statute, is obvious—by the former all dealings and transactions are void as against assignees, after an act of bankruptcy, and including the dealing, which is the act of bankruptcy—by the latter, all dealings and transactions are left untouched up to the date of the commission, unless as they are invalidated by the positive enactment of the 19th

section, which section, however, does invalidate all dealings which would in themselves be acts of bankruptcy.

But now comes the difficulty: "what is the necessity for the proviso to the 19th section, that *bona fide* dealings and transactions with a trader, made and entered into more than thirty days before the date of the commission, shall not be invalidated or affected by this act? It is argued that this must refer to the dealings declared by the previous part of the clause to be fraudulent, but I am convinced that it is not so—such dealings cannot be *bona fide* entered into. I think the proviso and the 37th & 38th sections were meant to refer to dealings *bona fide* in themselves, but which might, by possibility, have been affected by a previous act of bankruptcy, and if a previous act of bankruptcy has no effect upon subsequent *bona fide* transactions, the saving clauses may be unnecessary, but that is no reason why their meaning should be extended, so as to protect transactions declared to be fraudulent.

There is one point of view of the provincial act which seems to me to make it necessary to hold the saving proviso of the 19th sec. not to extend to protect the dealings and transactions declared void by the same section. The 11th section provides that no trader shall be liable to become bankrupt, by reason of any act committed more than four months prior to the issuing of a commission of bankruptcy. Now one of the most common acts of bankruptcy is the assignment of the trader's assets for the purpose of fraudulent preference; and if the proviso were, after thirty days, to protect such a transaction, the absurdity would follow, that a trader might be adjudged bankrupt for an act, which by the lapse of thirty days had become good and valid; and this the legislature could not have meant.

The want of relation back in the title of the assignees to the act of bankruptcy, appears to me to have been intentional, for the 19th sec. supplies the place of such a relation, by making certain dealings and transactions, fraudulent and void. This has the effect of preventing a trader from fraudulently disposing of his effects, though it does not avoid *bona fide* transactions taking place, after such fraudulent disposal.

What transactions shall be avoided by the provincial bankrupt law, does not depend upon inference or construction, but upon the positive terms of the 19th sec.; and if the assignment of debts in this case, falls within the definition of being made in contemplation of bankruptcy, and for the purpose of preferring one creditor over others, it is void. But if the words adopted by our legislature are the same, or to the same effect, of those used by the courts in England, in describing the constructive effect of the bankrupt laws there in avoiding transactions, the law is the same in this country as in England, and the cases decided in England apply here.

The words of the English act 6 Geo. IV. ch. 16, under which conveyances giving fraudulent preferences are avoided, are as follows: "shall make or cause to be made any fraudulent gift, &c., with *intent* to defeat or delay his creditors;" and are not different in effect from the Canadian act, which runs thus, that all payments &c., made or given in contemplation of bankruptcy, and for the *purpose* of giving any creditor, &c., any preference or priority over other creditors, shall be void.

In England, it has been held that contemplation of bankruptcy was necessary, with preference—in effect—to make the transaction fraudulent; and that the intent must be voluntary. Our statute has the very words of the English decisions, as to the contemplation of bankruptcy; and the word "purpose" is substituted for the word "intent." The words to defeat or delay creditors, have been held in England, to include cases where one creditor was preferred to another. The Canadian act, in terms, avoids transactions made for the purpose of preferring one creditor to another. The word "purpose" I take to mean precisely the same as the word "intent;" and so far as, in England, the intent must be voluntary, I think here we must hold it that the purpose must be voluntary. A man's purpose or intent in doing an act is not to produce all the effects of the act done, nor even all its necessary effects. It may be done for the purpose or with the intent of producing something else than the delay or defeasance of creditors, or the preference of one creditor over another. All payments, securities, gifts and

transfers, made by a trader who is not fully solvent, to one or more creditors, are necessarily in effect, delay, defeasance or preference, regarding others; but all such acts are not acts of bankruptcy, and void as such.

The courts in England have gone so far in separating the intent or purpose from the effect of a transaction, as to reject the word "whereby" from the sentence, with the intent or whereby any of his creditors may be delayed. Our act places no such difficulty in the way; all with us is made to depend upon the purpose of the trader, making the payment, assignment or transfer, or giving the security.

The cases are numerous in which it has been held, that a conveyance of all trader's effects to one creditor, or even for the benefit of all the creditors, is an act of bankruptcy, and therefore void. I do not think it necessary to inquire into the reasoning upon which these decisions are founded, because the doctrine is established beyond question, and the reasoning has not been made to affect cases in which the whole assests have been assigned. Assuming the law—it is however, necessary to enquire whether the case now before us, comes within the principle thus established by adjudicature in England.

The assignment sought to be impeached here, is not an assignment of all the trader's effects, in terms. It is an assignment of all the debts contained in a particular ledger. It was proved at the trial, that the trader's goods were under execution—that the sheriff had seized goods; but whether the trader had more goods or lands, or to what extent he had them, was not proved in the negative, so as to establish that the assignment was a transfer of all or of nearly all his property.

Neither (supposing the evidence of the execution to be sufficient to go to a jury, to find that the assignment included all or nearly all the property, and that any exception was merely colourable or unimportant) was it left to the jury to find this fact upon the evidence.

Wordsley v. Demattos, Burr. 477.—The assignment in this case was in terms an assignment of all, and for that reason held to be an act of bankruptcy.

Butcher v. Easte, 1 Doug. 294.—This was an assignment of all the trader's goods and effects whatsoever.

Newton v. Chantler, 7 E. 138.—This was an assignment of all his goods and stock in trade and effects whatsoever.

Compton v. Bedford, 1 Bl. 362.—The assignment was of all, some few particulars excepted to a trifling amount. Lord Mansfield observes: "I never gave any opinion in these cases (i.e. cases of assignment of all), without declaring that an exception of part (that was fraudulent) only would not make the assignment valid;" and the *jury* found for the plaintiffs.

Law v. Skinner, 1 Bl. 995.—An assignment of all his substance, of all his household goods and debts, both proved to be very trifling. The verdict was taken subject to the opinion of the court. Lord Eldon says, "This is not a partial conveyance of a trader's property, which is open to a different construction."

Linton v. Bartlett, 3 Wils. 47.—This is a case of a assignment of one-third of a trader's effects, he being insolvent, and for the purpose of borrowing money. It is plainly voluntary, and not applicable to the present question.

Berney v. Davidson. 1 Brod. & Bing. 408.—The conveyance in this case was of all freehold, leasehold and copyhold property, but not of personal property, which was small, as stated in the case. It was a case from Chancery, for the opinion of the judges, from particular circumstances not an act of bankruptcy—but the distinctions as to all and part, are discussed in the argument.

Berney v. Vince, 1 Brod. & Bing. 408.—The conveyance, like the last with additional statements of insolvency and stoppage of payment, and argued that as in the case no fraud or improper motive was imputed, such could not be relied upon, for if that had been so, the question would have been submitted to a *jury*. The assignment was held no act of bankruptcy.

It was argued in this case, by Bosanquet Serg.—see the report of it in 4 Moore, 324—that as no mention was made of the trader's personal property, in the case from Chancery, it was to be taken that he had none, and in that case it

would be a clear act of bankruptcy, *de non apparentibus et non existentibus eadem et ratio*, but the deed was held not to be an act of bankruptcy.

Subert v. Spooner, 1 M. & W. 714.—This was an assignment of all household goods and effects, all right to his farm, all his cattle, farming effects, all his stock in trade and utensils, and all other his personal estate whatever. At the trial before Lord Denman, it was left to the jury, whether the deed was executed fraudulently. The jury found for the defendant. The verdict was set aside. The deed conveying all, was held *per se* an act of bankruptcy.

Stewart v. Moody, 1 Crompt. M. & R. 777.—This was an assignment of *all* the trader's property, and it was held an act of bankruptcy under the 6th Geo. IV., the argument was upon the omission of the word "whereby," used in the statute 1 Jac. I, ch. 15, from the 6th Geo. IV. In this case the jury were charged on the express point, and the charge was upheld.

Morgan et al. v. Horseman, 3 Taunt, 241.—This was a case directed out of Chancery for the opinion of the Court of Common Pleas. The conveyance is of certain estates to trustees, to pay a pressing creditor 10,000*l.*, and then to pay certain debts due to relatives: it was held to be an act of bankruptcy, because of the latter trust, though said in the marginal note of the case to be valid, so far as the urgent creditor is concerned. This appears also in the argument and statement of the case. Lord Mansfield's expressions would lead, when taken loosely, to apply to the whole. It is, however, upon the voluntary provisions that the judgment is founded, which made the deed, in that part, an act of bankruptcy.—See Lawrence, J., p. 244.

Now here is a preference *in effect* of a *bona fide* urgent creditor, where a conveyance is not of the whole, and which is good, because the *purpose* or *intent* was not to prefer, but to comply with urgency—the face of the deed shews that the urgent creditor was placed before others, but it was not void.

Carr v. Burdiss, 5 Tyr. 136.—The trader, in this case assigned his household property and all his engines, ma-

chines, stock in trade, and effects upon the premises, to secure a debt due to his bankers of 13,147*l.*, and to cover any further advances. At the time of the assignment the trader was possessed of three ships, not covered by the deed. At the trial the plaintiffs in an action of trover, relied upon this assignment as an act of bankruptcy, for the purpose of claiming the value of the fixtures—the value of the goods and chattels which remained in the possession of the trader, until after a subsequent and clear act of bankruptcy, being relied upon to sustain the claim so far.

The jury, in answer to a question put to them by Gurney B., found that the deed was not executed in contemplation of bankruptcy, but with intent of giving the defendants the means of taking possession in case of bankruptcy.

The verdict was for the plaintiff, for the value of the loose property, with leave to move to increase the amount by the value of the fixtures, if the deed should be held an act of bankruptcy.

On motion to that effect, the court held that the deed was not an act of bankruptcy, not being an assignment of the trader's whole property, Baron Pike saying, "before this assignment could be held to constitute an act of bankruptcy, *it should have been* shewn that Clapham had no other property but that assigned, or so little other property, that by that assignment he had put the carrying on of the business out of his own power.

5 Tyr. 309.—The verdict was afterwards set aside on the motion of the defendants, the issue on the defendant's being in possession before the real act of bankruptcy, being deemed immaterial.

Stewart v. Moody, 5 Tyr. 493.—The trader in this case made an assignment of all his property in trust, to pay off a mortgage, and afterwards to pay his just debts. This was held to be a clear act of bankruptcy, because all was assigned.

Botcherly v. Ancaster, 5 N. & M. 383; Tappendon v. Burgess, 4 E. 230; Bach v. Gooch, 4 Camp. 232; Antram v. Chase, 15 E. 212; Pulling v. Tucker, 4 B. & A. 382; Balme v. Hutton, 2 Y. & J. 101. These were cases of undoubted assignments of the whole of the trader's property.

I have found no case in which the assignment was not on the face of it for the whole, when it was held to be an act of bankruptcy, in which the state of the trader's remaining property, or the absence of remaining property, was not clearly established ; in all these cases it was clearly ascertained.

To use the words of Baron Parke, in the case of *Curr. v. Burdiss*, it should have been shewn that the trader had no other property, or so little other property, that by that assignment he had put it out of his power to carry on the business. I do not think it sufficient to shew that he was unable to pay all his debts: the cases contemplate that the assignment itself should make it impossible for the trader to continue his business.

I have no doubt but that the facts proved at the trial, of the execution and seizure by the sheriff, and of Tennant's absconding after the assignment, might well have been left to the jury, as evidence of his having no other property, or very little other property, and I should have been satisfied with a verdict which had found that fact, or which had been found for the plaintiffs, had that point been mentioned to the jury in the charge of my brother McLean.

The finding of the jury, that the assignment was made in contemplation of bankruptcy, does not go to establish the point in question, for that may be upon the transfer of the smallest part, as well as of the whole of the trader's effects ; and moreover a contemplation of bankruptcy is not always a contemplation of insolvency, and it never, in itself, is sufficient to make an assignment *per se*, an act of bankruptcy.

This assignment was, as I before observed, of the debts in a particular ledger ; for anything I know, it may not have covered the tenth part of the debts due to the trader ; and there is not only a want of negative evidence on this head, but there is a total absence of evidence as to Coleman not possessing lands or goods besides those seized ; perhaps he may have owned property in other districts, which the sheriff of the district in which he lived could not seize : perhaps he might have had lands in the district where the sheriff made the seizure, to much greater value than the

book debts assigned. All this might have been made clear by the assignees, who, having vested in them the whole of his effects, might have shewn his schedule of property, and have thus furnished the negative evidence required.

If I am to look upon this assignment, as one of only a part of Tennant's effects, then the contemplation of bankruptcy and the voluntary purpose of preference, were both necessary ingredients to make the transfer void.

Fidgeon v. Sharp, 5 Taunt. 539.—In this case, Gibbs, C. J., says, the question of contemplation of bankruptcy being a mingled question of law and fact, was proper to be left to the jury; and the same may be said, it seems to me of the question of voluntariness, or in other words, of intent or purpose.

Morgan v. Brundett, 2 N. & M. 287; 5 B. & Ad. 289.—this case is worth remarking upon, particularly with a view to the present question. The bankrupt had obtained possession of the proceeds of a life insurance, belonging to his sister, and a bill in Chancery was filed against him; he sent two boxes of plate, and deposited them to secure the debt, with the defendant, who invested the money. The question of voluntary preference being left to the jury, in an action of trover by the assignees, the jury found there was a preference, and no adverse pressure, but on motion the verdict was set aside, Littledale, J., saying "both the questions of the voluntary preference, and the contemplation of bankruptcy, and particularly the latter, should be more accurately submitted to the jury." It is not now necessary to define what amounts to a contemplation of bankruptcy. It seems to me, that the cases upon questions of fraudulent preference, have lately gone much further than they ought to have done, and that the courts have been by degrees narrowing the rule in favour of assignees, more than I think correct.

Parke, J., says, "the proper definition of a voluntary preference, is a voluntary preference moving from the bankrupt in favour of a particular creditor;" and he afterwards observes, "If preference is to be disregarded in these cases, no person will be safe, and the effect will be that a delivery

of goods to a particular creditor will in all cases constitute an act of bankruptcy.

This case I consider very much in point in the present one. The verdict was set aside for the want of an accurate definition of a voluntary preference; in the present case, the question of a voluntary preference, though mooted at the trial, was not submitted to the jury at all.

Gibson v. Muskill, 3 M. & G. 158.—In this case the question was submitted to the jury, and the court examined very scrupulously the judge's charge: they set aside the verdict for the defendants, however, as contrary to evidence.

The jury finding again for the defendants, the case was sent down for third trial.—4 M. & G. 160.

Talfourd, Sergeant, says, *arguendo*, and referring to Alderson v. Temple, 4 Burr. 2235, and other authorities: "Although the question of a fraudulent preference may be one for the jury, yet it is one on the very verge of law, and may be reviewed by a judicial tribunal;" and Coleman, J., says, in giving judgment, "The question of fraudulent preference may be considered as hardly other than a question of law."

This is the case that I have been able to find, which comes nearest to authorizing the court to judge upon the question, after it has been omitted to be left to the jury; and yet it is far from going that length; it rather shews that, like all other questions of "*animus*" necessary to constitute offences, the court should direct the jury, and review the finding of the jury; but not that they should supply the place of the jury, in finding a disputed fact not submitted at the trial.

Aldred v. Constable, 4 Q. B. 673, is a case where the charge to the jury is scrupulously examined, and the verdict for the defendant set aside, for the purpose of a clearer charge. The definition of Mr. Justice Parke, in Morgan v. Brundrett, of fraudulent preference, is somewhat called in question; but I can find nothing in the case adverse to the opinion of the present one, which other cases have led me to adopt.

Gibson et al. v. Bruce, 5 M. & G. 397.—The verdict for

the defendants was set aside, in order that the jury might be more accurately instructed on the question of voluntary or fraudulent preference.

Belcher et al. Assignee, v. Jones, 2 M. & W. 258, is a very important case, and goes to support and illustrate the doctrine I have endeavoured to explain. Sir William Follett's argument was very ingenious to shew that the fraudulent preference might depend upon the consequence; here he says, is an unequal distribution of the funds, the direct consequence of the act of the bankrupt. The bankrupt had given notice of his insolvency to a director of an insurance company, that he might draw out a sum in the bankrupt's bank, on his private account, but he gave notice to the company, and a sum of 8000*l.* was drawn in consequence. The question was, whether this was a fraudulent preference of the insurance company; and the court held that it was not, although the demand was in consequence of the information of the bankrupt, for the purpose of another fraudulent preference, and although there was no pressure beyond the presentment of a banker's check, upon a bank on the eve of stopping payment.

Marshall v. Lamb, 5 Ad. & El. 114.—The question of fraudulent preference is in this case left to the jury, who return a verdict subject to a point of nonsuit reserved; and the nonsuit was afterwards refused, it being a clear case of voluntary preference, that is to say, a payment of a sum of money to clear off a mortgage on the separate property of the wife, for her benefit and not for the benefit of the creditors. It was in fact rather a fraudulent payment or gift, than a fraudulent preference.

Turquand v. Vanderplank, 10 M. & W. 180.—This was a special case made at the assizes, when it was suggested by Lord Abinger, that, as the facts were almost wholly undisputed, it should be left to the Court of Exchequer to determine in what manner the verdict should be entered. Afterwards, on the argument, Lord Abinger himself said that it was properly for the consideration of a jury, and perhaps ought not to have been made a special case at all; but it was decided, because the court were able to dispose

of it without pronouncing on the question of fraudulent preference.

After a careful examination of these and other decisions, I am led to the following conclusion, as to the case before us. First, as regards the alleged avoidance of this assignment of the debts contained in a certain ledger : 1st, That it is not on the face of it, an assignment of the whole effects of the trader, or the whole with any ascertained exception. 2ndly, That the assignment appearing to be for a part of the trader's property, there is no sufficient evidence as to the state of the remainder, to warrant the court to assume, neither was it assumed at the trial, or undisputed, that the remaining property was unimportant. 3rdly, That mere insolvency or inability to pay the whole of a trader's debts, is not sufficient to make an assignment of a portion of his effects *per se* an act of fraudulent preference. And 4thly, That it was not left to the jury, upon such evidence as was before them, that this assignment was of the whole or nearly the whole of the trader's effects. And there is nothing in the finding of the jury, to shew that they so considered it. I therefore do not consider this case to come within the class, in which assignments in favor of one creditor are fraudulent *per se*, without the other ingredients of voluntary preference, in contemplation of bankruptcy. Then I do not consider this assignment made an act of fraudulent preference, because it appears on the face of the deed, that it in effect prefers one creditor to others; and because it is not shewn to have been made under what the law calls duress. All payments and securities in full, made by an insolvent trader, are necessarily preferences in effect, yet they are not all void in acts of bankruptcy. Neither do I think that the trust contained in this deed, to pay other creditors with the residue ratably, after payment of the trustee creditor in full, makes this assignment any worse, than if it contained a provision for the residue to be paid to the trader himself, or than if it contained no provision as to the residue of all. The case I before cited, *Morgan v. Horseman*, 3 Taunt. 241, appears to me to be clear authority. There was an assignment to pay an urgent creditor, 10,000*l*.

and to other creditors, who were not urgent, their debts, to the exclusion of remaining creditors, and there was no legal duress; yet the assignment was good as regards the urgent creditors; and an act of bankruptcy only so far as it was voluntary. It follows then, that to make this assignment to the defendant void, as against him, it must have been voluntary in the sense in which that term is used in the English cases; and I can find no case of an assignment, or payment of part of a trader's effects, which has been adjudged a fraudulent preference, in which the fact of voluntariness was not either admitted, or undisputed, or stated as a part of the case referred from Chancery, or else submitted to the jury. In this case, I think there was sufficient evidence to be submitted to the jury; but I do not find that it either engaged the consideration of my brother McLean, or of the jury, or that it was considered by either as important. The attention of the jury was, on the contrary called to the question of knowledge on the part of the defendant, whether the defendant knew that there would not be enough left for the other creditors. A sale to a purchaser may be avoided, because he knew that it was made for the purpose of evading payment of creditors, or, in England, after an act of bankruptcy committed, a payment to a creditor may be avoided because of his knowledge of such a fact; but up to the time of bankruptcy, whether it follows immediately upon the commission of the act of bankruptcy, or upon the issue of a commission, I know of no rule of law to prevent creditors being urgent for and requiring security in full, merely because their debtor is insolvent or on the eve of bankruptcy. The knowledge or suspicion of these facts is to be found in many of the English cases, without being considered of importance as avoiding the transactions. On the contrary, the urgency of creditors arising from the knowledge or suspicion of insolvency, has been repeatedly held to relieve the transaction in question from the character of a fraudulent preference, and in no case that I have found has it been held to give it that character.

It appears to me, for these reasons, that this case should

be submitted to another jury, and the more so, as it is not the sum for which this action is brought, which is alone involved in the event of the cause, the parties having agreed to abide the event, as to the whole of the effects assigned.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.—Rule for new trial discharged.

SULLIVAN, J., *dissentiente*.

TURNER V. HAM.

Disjunctive replication—Surplusage and repugnancy in pleas.

Action on a bond. Plea—that bond was obtained from defendant, by Ham and others in collusion with him, by fraud, &c. Replication—that bond was not obtained by fraud of Ham and others in collusion, &c. Demurrer—that replication should have been in the disjunctive. Held, *per Cur* replication good.

Action on a bond. Plea—that bond was obtained from defendant, by Ham and others in collusion with him, by fraud, &c. Replication—that bond was not obtained by fraud of Ham and others in collusion, &c. Demurrer—that replication should have been in the disjunctive.

There were several other pleas which were demurred to; the points may easily be gathered from the judgment of the court—they are so clear as to make a more lengthened reference to them unnecessary.

Duggan for the demurrer. *Hagarty* contra. The cases cited on the argument were—1 Saund. 316; 2 Saund. 207. 4 B. & C. 747; 2 M. & Gr. 1; Cox v. Cox, 4 U. C. R. 207.

ROBINSON, C. J., delivered the judgment of the court.

The replication is not bad, I think, for the cause alleged, though it would have been better to have denied the plea disjunctively.

It does not compel the defendant to prove more than would make a good defence under his plea. The appearance of duplicity is only occasioned by the plaintiff having followed the language of the defendant's plea. I refer to the case in this court of Cox v. Cox. 4 U. C. R. 207, and the cases cited in it.

The fifth plea we consider good. It speaks of the *said sum* of ten shillings, and it is quite clear what that sum is, the words inserted afterwards, "in the said writing obligatory mentioned," can do no harm. The defendant meant to refer to the condition rather than the bond, but the sum intended is quite evident, and the reference to the writing obligatory, is mere surplusage, and cannot hurt.

The sixth plea is rather less subject to the exception taken than the fifth plea is, for it makes express reference to the declaration, and therefore we can be in no doubt what sum is referred to; and what is said of the writing obligatory, is surplusage and does no harm.

The seventh plea is informal and bad, for the repugnancy in the sums mentioned.

The eighth plea is objected to, only on the same grounds as the fifth and sixth, and is not in our opinion insufficient, for the same reasons that we have held those pleas sustainable.

The ninth plea is clearly good. The plaintiff rests his demurrer upon a nice point of practice, and one which does not apply here.

Per Cur.—Judgment for the defendant on all the pleas but the seventh, and as to that, the defendant may amend by paying costs

OUTWATER V. DAFOE.

Appeal from District Courts on special points of demurrer—Trespass—Justification under fi. fa.—Return of writ.

Semble, that upon appeals to this court from the District Courts—on points of special demurrer—it does not follow that effect will be given to all objections which would be allowed to prevail in this court.

A plea, justifying an act of trespass in seizing goods, &c., under a writ of *fi. fa.*, must shew that the goods were seized *before* the return of the writ.

Appeal from the District Court of the Victoria District.

Trespass for seizing and selling cattle. Plea justification under a writ of *fi. fa.* issued from the Division Court, without an averment that the goods were seized before *the return of the writ*. Demurrer on this ground, and on a number of other special grounds. The plea was held good in the court below; this decision was appealed from.

The grounds of special demurrer are not stated, as the court above expressed no opinion thereupon, for the reason they have assigned.

ROBINSON, C. J., delivered the judgment of the court.

It must not be assumed, so far as my opinion is concerned, that upon appeals to this court from decisions in the District Court, upon special demurrers, (which I cannot imagine the legislature ever intended to allow), effect must necessarily be given to every objection in pleadings, which would be allowed to prevail in the supreme court.

Upon any of the twenty-five special causes of demurrer, with which the record in this case was unreasonably loaded, I give no opinion, so far as they seem to be unsustainable otherwise than on special demurrer, but there is at least one exception, which we think we must give effect to as a substantial objection—it is not averred that the goods were seized before the return of the writ. We think, that on that ground, the judgment below must be reversed, and the judgment be given for the plaintiff on the demurrer—but with leave to amend on payment of costs.

Per Cur.—Judgment below reversed.

MCKAY V. CAMERON.

Action against bailee for loss of horse and buggy by careless driving—argumentative and other defective pleas—Demurrer.

Special assumpsit against bailee for killing a horse let to hire, by careless and immoderate driving, and breaking buggy and harness, and not returning them.

3rd plea.—That horse was a run-away horse, and that the damage was occasioned thereby.

4th plea.—That the plaintiff hired the horse, knowing him to be a run-away; and that the horse ran away without the fault of the defendant.

5th plea.—That the defendant did offer to return the buggy and harness—but in the broken state they were in after the run-away.

Demurrer to 3rd, 4th and 5th pleas. *Held, per Cur.*—Pleas bad.

Special assumpsit against bailee for killing a horse, let to hire, by careless and immoderate driving, and breaking buggy and harness and not returning them.

3rd plea.—That horse was a run-away horse, and that the damage was occasioned thereby.

4th plea.—That the plaintiff hired the horse, knowing him to be a run-away horse; and that the horse ran away without the fault of the defendant.

5th plea.—That the defendant did offer to return the buggy and harness, but in the broken state they were in after the run-away.

Demurrer to the third plea: that the said third plea amounted to no denial of the carelessness of the defendant in the said declaration mentioned, and was no answer to the matters alleged in the same; and also, for that it was not shewn that the said horse did run away; nor did it aver that the said plaintiff knew that the said horse was a run-away horse, or unfit safely to go or proceed on the said journey; and also, that the matters therein stated, might have been given in evidence under the general issue, if the same offered any defence to the said action.

Demurrer to fourth plea: that the said fourth plea was no answer to the breaches in the declaration mentioned, and did not deny that he, the defendant, immoderately, violently, carelessly and improperly, drove and used the said horse and buggy and harness; and also, for that, although the said fourth plea proposed to all the said declaration, it did not answer the same; and also, that if the said fourth plea amounted to any defence, the matters therein contained might have been given in evidence under the general issue.

Demurrer to fifth plea: that it was no answer to the declaration, and did not deny that the defendant so immoderately, violently, carelessly, and improperly drove and used and managed the said horse, that the said horse became and was so greatly hurt and injured as in the said declaration mentioned.

Hector for the demurrer. *Martin*, of Hamilton, contra. The cases cited in the argument were—2 A. & E. 834, N. S.; 3 Dowl. 379; 3 Camp. 5; Smith's Leading Cases, 100; 2 Chit. Rep. 402.

ROBINSON, C. J., delivered the judgment of the court.

The third plea is undoubtedly bad, for it rests the defence on the imputed bad qualities of the horse which the defendant had hired, without shewing how the horse, being a run-away horse, occasioned the injury, and without even asserting explicitly that it did. It neither denies, nor confesses and avoids the breach of contract complained of.

The fourth plea is also bad, because it does not answer the alleged failure to deliver back the buggy and harness. If this plea could be allowed to be a full answer to the declaration, then it would follow, that whenever a person who has hired a horse and carriage, has the bad luck to have them damaged in his service, he need give himself no trouble about returning or offering to return them, but will be entitled to keep them.

It is true, the plea states that the buggy and harness had become useless and of no value, which could scarcely be literally true unless they were annihilated; and at all events, the defendant was not entitled to keep them, because they had been spoiled in his service.

The fifth plea rests the defence on matters referred to in the fourth plea—and the defence, therefore, so far as it is necessary, depends for its support on the fourth plea, and must be subject to any exceptions which that plea is subject to.

Both are in point of form bad, as neither confessing and avoiding, nor formally traversing the declaration.

The declaration charges immoderate, careless, and improper driving, as having led to the death and consequent non-delivery of the horse; as to the buggy and harness, it does not state them to have been injured, but merely complains of their not being returned.

In this fifth plea, the defendant applies himself only to accounting for not delivering back the buggy and harness; and he does so by pleading that the horse was a run-away horse, as the plaintiff well knows; that while he (defendant) was quietly and leisurely proceeding, the horse, without any fault of his, ran away and destroyed the buggy and harness; that they became useless and of no value.

Then the effect of the fifth plea is, to take up this statement in the fourth plea up to this point, and to add to it, that he offered to deliver up the buggy and harness to the plaintiff in the damaged state in which they were, and that plaintiff would not receive them.

Now all this clearly would be no defence, unless what the plaintiff charges, viz., the immoderate, careless, and improper driving of the horse, be untrue; and this the de-

fendant does not deny, so that no issue can be properly raised upon it; he does so argumentatively only, saying that the horse, without any fault of *his* and *while he was quietly and leisurely proceeding on his journey*, ran away. So here we have two affirmatives which do not make an issue. The plaintiff says that the defendant drove immoderately, carelessly and improperly. The defendant says he was quietly and leisurely proceeding on his journey, and the horse ran away without any fault of his. The defendant should have denied in express terms, that he was driving immoderately at the time of the accident; and he should further have affirmed expressly, that the breaking of the carriage and harness, was an inevitable consequence of the running away of the horse, and could not have been avoided, under the circumstances.

When the horse ran away, it made it incumbent on the defendant to act with ordinary care and skill in the exigency, and to prevent the carriage being destroyed, if he could; he only pleads that the running away of the horse was from no fault of his; he does not aver that the destruction of the carriage and harness was from no fault of his—he treats them as if they happened of course.

Per Cur.—Judgment for plaintiff on demurrer.

GATES V. DEVENISH.

Statute labour—where to be performed—Conviction not set aside, a protection to magistrate,

A party, to save himself from fine, must perform—when called upon—his statute labour *within the division* of the township in which *he resides*.

A conviction made by a magistrate, so long as it has not been set aside, protects him against an action for trespass.

Special case.—This was an action of trespass against the defendant, who is a magistrate for the Home District, for seizing a cow of the plaintiffs. The declaration, which was filed in July last, was in the ordinary form. The defendant pleaded not guilty per statute. The cause was ready for trial at the last assizes for the Home District.

It was admitted that the plaintiff was an inhabitant of the township of Scarborough; he was called upon on the ninth day of July, 1847, within the time fixed by the statute,

by the overseers of highways for the division of that township in which he resided, to perform the statute labour upon a certain highway in that division, according to the provisions of 1 Vic. ch. 21. He refused, and produced the following certificate of the two district councillors for the district :

“This is to certify that Jonathan Gates has agreed with the councillors of the township of Scarborough, that he shall have the privilege of doing his statute labour together with his sons, on the road between lots 18 and 19.

“PETER SECOR, D. C.

“WILLIAM PATERSON, D. C.

“May 8th, 1847.”

It was admitted that the road mentioned in this certificate was not in the division in which plaintiff resided, but in another division of the township, at a considerable distance therefrom, and that the plaintiff duly performed his statute labour on the road mentioned in the certificate ; that Messrs. Secor and Paterson were at the date thereof the district Councillors of Scarborough ; and that the overseers of highways, in the divisions in which plaintiff resided, having made complaint before defendant, then being such magistrate as aforesaid, he, with a full knowledge of all the premises, issued his warrant, under the 22nd section of the above act, to levy the fine for six days' work and costs, which was accordingly done.

It was admitted that notice on the defendant was duly served, and that this action would be in this form, and the plaintiff be entitled to recover, in case the above mentioned certificate was sufficient excuse to the plaintiff.

It was admitted that no by-law or order of the District Council for the Home District had been passed, authorizing the township councillors to give such a certificate, or in anywise altering the law touching statute labour, from that established by 1 Vic. ch. 21, or any other enactment.

The following act of the Warden and Council of the Home District was passed 12th February, 1842, and was admitted to have been in force since then :

“Whereas, by a certain act of the legislature of the pro-

vince of Canada, passed in the fourth and fifth years of the reign of her present majesty Queen Victoria, entitled 'An Act to provide for the better internal government of that part of this province which formerly constituted the province of Upper Canada, by the establishment of local or municipal authorities therein,' it is, among other things, enacted, that all and every the power and authority, which by any act or acts in force within that part of this province which formerly constituted the province of Upper Canada, are now vested in the justices of the peace for the several districts, with regard to highways and bridges, or work connected therewith, shall, after the first day of January, 1842, become and be vested in, and may be exercised by the district council for such districts respectively within the limits thereof. And whereas it is necessary for the due execution of the powers therein granted, and for the better protection and management of the local interests of her Majesty's subjects, that the power hitherto vested in and exercised by the justices of the peace acting within any division of this district, so far as the same has been vested in the district council, shall be exercised by the councillors within their several townships respectively. Be it enacted by the Warden and Councillors of the Home District, that from and after the passing of this act, that all and every the power and authority which, by any act or acts in force within that part of the province which formerly constituted the province of Upper Canada previously to the passing of the before recited act, was vested in the justices of the peace acting within any division of the district, so far as the same has been conferred upon the district council, shall be exercised by the councillors of this district, acting within the township or townships for which they may have been elected respectively."

The question for the opinion of that court was, whether the district councillors of a township have the power to authorise a party liable to perform statute labour in that township, to perform it in any other division than that in which he resides. And if the court should be of opinion that the said councillors have such power, that then a ver-

dict was to be entered for the plaintiff, with five pounds damages; but if the court should be of a contrary opinion, then a verdict was to be entered for the defendant.

Hagarty for the plaintiff. *Dr. Connor* for the defendant. The statutes referred to were—1 Vic. ch. 21, sec. 20, 29, 30, 50; 4 & 5 Vic. ch. 10, sec. 45; By-law of District Council, in February, 1842; 3 Vic. ch. 10; 59 Geo. III. ch. 9, sec. 27.

ROBINSON, C. J., delivered the judgment of the court.

The conviction, which is admitted to have been made by the defendant as a magistrate, protects him from this action so long as it has not been set aside, and therefore we cannot give any other judgment than for the defendant.

We can find nothing in any of the statutes referred to, or in the by-law laid before us, which would uphold the certificate granted by Messrs. Secor and Paterson; nor can we find anything in any statute, which would at any time have upheld a certificate such as has been given here, if it had been granted by a justice of the peace. We are of opinion therefore, that the defendant is entitled to a verdict.

Per Cur.—Postea to defendant.

BAYS V. RUTTAN, SHERIFF.

Pleadings—Return by Sheriff to a writ of *fi. fa.*—When an estoppel against plaintiff.

To an action against a sheriff for a false return of *nullo bona* to a writ of *fi. fa.* the bare fact, that the plaintiff, after such return, sued out a *ca. sa.*—will be no defence—unless it be further averred in the plea, that the plaintiff accepted the return of *nulla bona*, with a knowledge at the time that it was false.

Declaration.—Case against a sheriff on two counts, for a false return to a writ of *fi. fa.* 1st, for seizing and levying and a false return. 2ndly. For not levying, and a false return.

Plea.—And for a further plea in this behalf, the defendant to the first count of the said declaration says, that the plaintiff ought not to be admitted or received to say, as, &c., that the defendant falsely and deceitfully returned to the court of our said lady the Queen, at Toronto, upon the said writ in the first count mentioned, that the said Alexander G. Allan had not any goods or chattels in his, the sheriff's district,

whereof he could cause to be levied the damages in that count mentioned, or any part thereof, because the defendant as to the first count of the said declaration, says, that the plaintiff, at the time of the return of the *fi. fa.* therein mentioned, accepted from the defendant, as such sheriff as aforesaid, the said *fi. fa.* with the return to the same, as in the said count is mentioned, that the said Alexander G. Allan, had not any goods or chattels in the said district, whereof the defendant, as such sheriff, would cause to be levied, the damages aforesaid, or any part thereof—as true. And the defendant further says, that the plaintiff upon such return, and believing the same return as true, did afterwards, and long before the commencement of this suit, to wit, &c., at Toronto, sue and prosecute out of this honourable court, a certain other writ, called a *capias ad satisfaciendum*, directed to defendant, as such sheriff as aforesaid, by which said writ, after reciting, &c., was endorsed, &c., and delivered to sheriff, &c. And the defendant says, that the return of the writ, as in the first count mentioned, and as above in this plea contained, to the said writ, in the first count mentioned, has always, since the making of the same return, been treated, accepted and acted upon by the plaintiff as a true return; and as a true return, and founded upon the same as aforesaid, the plaintiff sued out the *capias ad satisfaciendum*, above in this plea mentioned, and the said *capias ad satisfaciendum*, from the suing out of the same, has not been abandoned or countermanded or waived by the plaintiff, or set aside or vacated in any way; and the same writ has at all times been treated by the plaintiff as a valid, effectual and operative writ, for the purposes in the same writ expressed, and to conclude the plaintiff denying the truth of the return to the writ, in the first count mentioned, and after which said return to the said *capias ad satisfaciendum* issued, and to bring the defendant, as such sheriff, to obey the commands thereof, and the direction of the same endorsement; and this the defendant is ready to verify, &c. Wherefore he prays judgment, if the plaintiff ought to be admitted or received to say, that the defendant falsely and deceitfully returned to the said court, upon the

said writ, in first count mentioned, that the said Alexander G. Allan had not any goods or chattels in his, the defendant's district, whereof he could cause to be levied the damages in the first count mentioned, or any part thereof.

Same plea to second count.

Demurrer : that the said plea is double and multifarious, and attempts to put in issue several distinct and traversable facts, to wit, first, the fact that the plaintiff accepted the return to the writ of *fi. fa.*, in the first count of the declaration complained of, and alleged to be false, as a true return ; and, secondly, that the plaintiff, after the said return, treating the same as true, sued out a writ of *capias ad satisfaciendum* upon the said writ and return, and acted thereon.

That it is also uncertain whether the said plea is intended as a justification of the alleged false return, in the first count complained of, or an answer to the same, by reason of a waiver, release, discharge or satisfaction by or to the plaintiff, of the grievances complained of in the said first count, in either of which cases the said plea is informal and defective ; for that it is not thereby shewn that, at the time of the acceptance by the plaintiff of the said false return, the plaintiff had any knowledge or notice that the same was false, or that the defendant had in fact levied the amount of the said writ, as in the first count alleged. Nor is it by the said plea shewn that the plaintiff released or discharged the defendant from the causes of action in the said count first set forth and complained of, by any binding or legal instrument ; nor, if the said plea is intended as an answer to the first count, by reason of the plaintiff having obtained satisfaction of his judgment by the issuing forth of the writ of *capias ad satisfaciendum*, is it shewn that the defendant, as such sheriff as aforesaid, ever executed the said writ of *capias ad satisfaciendum*, or that the plaintiff was thereby in anywise satisfied his said judgment. And for that also, the defendant, by the said plea confessing the falsity of the return to the said writ of *fi. fa.*, in the said first count complained of, and the said grievances therein set forth, shews no good or valid avoidance of the same.

Eccles for the demurrer. *D. B. Read* contra. The cases cited on the argument were—1 C. & P. 154 ; 4 P. & D. 112 ; 2 P. & D. 556 ; 10 A. & E. 673 ; R. & M. 310 ; Starkie Ev. 3 vol. 1018 ; Smith's leading cases, 544, 511 ; 10 B. & C. 468. 4 M. & Gr. 209 ; 2 Bing. 10 ; 6 Taunt. 202 ; 7 Bing. 339 ; 6 A. & E. 475.

ROBINSON, C. J., delivered the judgment of the court.

Both of these pleas are in our opinion bad in substance, as constituting no defence ; for they rely on the bare fact of the plaintiff having believed the sheriff's return to be true, and suing out a *ca. sa.* in consequence, as estopping him from shewing that when the return was made, it was false to the knowledge of the sheriff, though not to the knowledge of the plaintiff, who accepted it.

It would be contrary to all reason that such should be the legal consequence of putting faith in the acts of a public officer ; for so far as regards the facts stated in the first count, it would amount to this—that if a sheriff, having levied the debt under a *fi. fa.*, could continue to keep the plaintiff in ignorance of it, and lead him to accept a return of *nulla bona*, and then sue out a *ca. sa.* upon it, the sheriff might then keep the money ; and though the injustice would not be so striking in regard to the cause of action stated in the second count, yet the legal effect would be the same ; because when the sheriff has notice that there were goods which he ought to have seized under the *fi. fa.*, and yet gets the plaintiff, while in ignorance of the truth, to trust to his return that there were no goods, and to sue out a *ca. sa.*, he might by that contrivance screen himself from the consequence of the most negligent or corrupt conduct on his part, and might wholly defeat the plaintiff's remedy.

The case of *Piccard v. Sears*, 6 A. & E. 475, and of *Goslin v. Byrnie*, 7 Bing. 339, cited for the defendant, are no doubt very sound and just decisions ; but they rest upon the principle, that where, upon the statements or acquiescence of one party, another has been induced so to act that it would affect his interests, if what he did under an impression of the truth of what was made appear, should be suffered afterwards to be reversed—then he shall be protected.

But here the defendant is endeavoring to protect himself, not by shewing that he relied on the statements or acts of the plaintiff, but because the plaintiff, for all that appears, ignorantly relied upon *his* statements.

If the defendant, knowing that there were goods, falsely returned to the *fi. fa.* that there were none ; and still more, if having actually levied the money from the goods, he falsely returned that the debtor had no goods, that return would be false and fraudulent, and fraud can always be shewn. There is no estoppel against proving the truth, for that purpose.

These pleas, to have made them good, should have averred that the plaintiff accepted the return of *nulla bona*, with a knowledge at the time that it was false, and then indeed there would appear to have been no wrong done to him.
—4 D. & R. 155.

Per Cur.—Judgment for plaintiff on demurrer.

KAY ET AL. V. GAMBLE ET AL.

Construction of conveyance—as to the necessity of averring affirmatively in declaring thereon—that the plaintiff had sold certain lands—or why he had not sold them—before he could entitle himself to sue upon the covenant for the non-payment of a sum of money.

Covenant for the non-payment of 6000*l.*, upon the following indenture, which was set out in oyer :—

“This indenture, made this 23rd day of July, 1846, between James Mathewson, of the city of Montreal, in the province of Canada, merchant, and John Sinclair, of the same place, merchant, carrying on business at the said city, under the style of Mathewson and Sinclair, of the one part, and Clark Gamble, of the city of Toronto, in the said province, Esquire, Richard Woodsworth, of the same place, builder, and Joseph Wilson, of the same place, cabinet-maker, parties of the second part.

“Whereas the said parties of the first part have accepted the drafts of certain persons trading at the said city of Toronto, under the name of Hamilton, Hales and Chettle, for the sum of 9000*l.*, for the accommodation of the said drawers, which said drafts were drawn during the early part of this present year, a particular schedule of which is

to be appended to these presents, so soon as the same can be obtained.

“And whereas certain of those drafts have already fallen due, and have not been paid by the said Hamilton, Hales and Chettle, who have declared their inability to meet any of the said drafts, as they fall due.

“And whereas the said Richard Woodsworth and Joseph Wilson, two of the said parties of the second part, have endorsed several of the said drafts of the said Hamilton, Hales and Chettle, and have also become endorsers upon certain promissory notes of the said Hamilton, Hales and Chettle, given to the said parties of the first part, as collateral security for the said drafts, amounting in the whole to 4000*l.*, a schedule of which is also to be endorsed on these presents.

“And whereas the said Woodsworth and Wilson, being liable to be called upon for payment of the said bills and notes as they fall due, are desirous of being relieved from such immediate liability.

“And whereas the said parties of the first part have agreed to indemnify, as well the said Hamilton, Hales and Chettle as the said Wilson and Woodsworth, of and from all liability upon such drafts and notes, and to give two years from the date of these presents for payment of their said debt, upon the conveyance to them of certain real estate, and upon the receipt of certain negotiable securities, the particulars of which are also endorsed upon these presents, and upon having the payment of such portion of their said debt, as shall remain unsatisfied at the expiration of two years from the date hereof, secured to them by these presents.

“And whereas the said parties of the first part have also agreed to obtain from certain creditors of the said Hamilton, Hales and Chettle, in the cities of New York and Montreal, the time hereinafter mentioned for payment of their debts, in consideration of letters of guarantee, signed by the said parties of the second part contemporaneously herewith, whereby the said parties of the second part secure to all the creditors of Hamilton, Hales and Chettle, payment of their debt in full, one half at the expiration of one year, and the

other half at the expiration of two years from the date of these presents.

“Now this indenture witnesseth, that the said parties of the first part, for themselves, their heirs, executors and administrators, and for every of them, do covenant, promise and agree, to and with the said parties of the second part, their executors, administrators and assigns, that they, the said parties of the first part, shall and will retire the several drafts and promissory notes, set out in the first schedule to these presents annexed, and deliver to the said parties of the second part, such as have not been negotiated; and also, that they, the said parties of the first part their executors and administrators, shall and will, from time to time, and at all times hereafter, until the said bills, drafts and notes shall have been delivered up as aforesaid, save and keep harmless and indemnified the said Richard Woodsworth and the said Joseph Wilson, their executors and administrators, and their and every of their lands, tenements, goods, and chattels, of, from and against, all actions, causes of action, suits and proceedings whatsoever, which shall or may at any time or times hereafter be brought, had, commenced or prosecuted against the said Woodsworth and Wilson, or either of them, their or either of their executors or administrators, touching the said bills or notes, or any of them, and against all costs and charges, damages and expenses, which they or any of them shall or may pay, bear, suffer, sustain and be put to, for, or by reason or means or on account of the said bills or notes, or any of them, or the said moneys thereby secured, or any act, matter or thing, relating thereto. And the said parties of the first part, for themselves, their heirs, executors and administrators do further covenant and agree to and with the said parties of the second part, their executors and administrators, that they, the said parties of the first part, will proceed to realize and convert into cash, the moneys secured by the several securities mentioned in the second schedule hereto, as they may deem most for the advantage of those concerned, it being nevertheless understood that they are not to be held liable for any error of judgment in the execution thereof;

and further, that they will proceed to the sale of the real estate, with as much speed as possible. But, nevertheless, they covenant not to sell the same at less prices than those fixed in the schedule hereto, without the assent in writing of the said parties of the second part, their executors and administrators or assigns. And the said parties of the second part, for themselves, their heirs, executors and administrators, and every of them, hereby covenant and agree to, and with the said parties of the first part, their executors or administrators, that they or some of them shall and will pay unto the said parties of the first part, their executors or administrators, within two years from the date hereof, such portion of the said sum of 9,000*l.* as may remain due, after deducting all such sums as may have been already realized by the said parties of the first part, from produce consigned to them by the said firm of Hamilton, Hales and Chettle, as well as such further sums as may be hereafter realized from the securities enumerated in the schedule hereto annexed, or from the sales of real estate therein specified, together with interest for the same; and the said parties of the first part, for themselves, their heirs, executors and administrators, do further covenant, promise and agree to, and with the said parties of the second part, their heirs, executors and administrators, that they, the said parties of the first part, shall and will procure the creditors of the said Hamilton, Hales and Chettle, residing in the cities of New York and Montreal, and enumerated in the third schedule hereto annexed, within one month from the date hereof, to give to the said Hamilton, Hales and Chettle, the time hereinafter mentioned for the payment of their several debts, they, the said parties of the second part, hereby covenanting to hand the said parties of the first part, forthwith, letters of guarantee security to all the creditors of the said Hamilton, Hales and Chettle, a correct list of whom is contained in the third schedule hereto, the full amount of the debts set opposite to their names, which is hereby declared to be the full amount due to them, one half within one year, and the residue in two years from the date hereof, with interest upon the same.

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year above written. Signed, sealed, &c."

1st plea.—That the said James Lavens Mathewson and John Sinclair did not, nor did the plaintiffs, as assignees, &c., proceed to the sale of the real estate, in the schedule to the said deed mentioned and set forth, at any time heretofore, and the same real estate, or any part thereof, has never been sold or disposed of, and this the said defendants Richard Woodswort and Joseph Wilson are ready to verify, &c.

2nd plea.—That it never has as yet been ascertained between, or by any of the parties, to the said indenture or deed, or by the said plaintiffs, what portion or part of the said 9,000*l.* remains due, for that no sales or sale of the said real estate mentioned in or by the said deed, or referred to therein or thereby, has at any time before the commencement of this suit, been made at any time whatever, and this the defendants are ready to verify, &c.

3rd plea.—That the plaintiffs did sell and dispose of the said real estate mentioned in the schedule to the said deed and referred to in the said deed, for less prices than those fixed thereto respectively, without obtaining the consent in writing of the said Richard Woodsworth, Joseph Wilson and Clarke Gamble for such purpose, and this the defendants are ready to verify, &c.

These pleas were demurred to, with the object of obtaining from the court, an opinion as to the legal effect of the indenture requiring the plaintiffs to aver affirmatively, before they could recover the 6000*l.* at the expiration of the two years, a sale of the land, &c.—or why they had not been sold—with an offer in such case of a reconveyance.

Dr. Connor for the demurrer. *Burns* contra. The following cases were cited on the argument—3 Bing. N. C. 355; 1 Saund. 320 (note b); Smith's leading cases, vol. 2; 2 M. & Gr. 573; 4 C. & P. 309; 1 M. & Gr. 757; 5 A. & E. N. S. 245.

ROBINSON, C. J., delivered the judgment of the court.

The third plea has been conceded to be bad in substance.

With regard to the first and second, I am of opinion that they are good defences to the action. They rely in substance upon the same defence, and they rest upon an objection, which would form equally the ground of an objection to the sufficiency of the declaration; for if it be a good defence to plead that the covenantees have never disposed of the land, then on the same principle to entitle them or their assignees to sue, they ought to have shewn what they did with the land. The pleas only bring out the objection more plainly.

The parties gave us to understand, on the argument, that they were really desirous having the opinion of the court on the legal effect of the instrument in that respect, rather than on the form of pleading.

I must say, it appears to me clear, looking at the instrument as it is set out on oyer, that before the plaintiffs can be in a situation to demand of the defendants a sum of money as remaining due to them, at or after the expiration of the two years, they must shew that they have sold the land, and what sum it has produced, or that they have sold part, and to what amount, and account for not having sold the remainder: or must account for not having sold any, if such be the fact, by shewing that they could not dispose of the land at the schedule, prices, and that the defendants refused to allow it to be sold under.

For all that we see in this record, the plaintiffs may have made no attempt whatever to sell the land; and while they still retain the title, may be endeavoring to compel the defendants to pay the whole debt, as if there had been no lands put into their hands for the purpose of satisfying it.

There can be no question here about the doctrine of conditions precedent, because we find the necessity for some such averment as I have stated, imposed by the very terms of the defendants' covenant, which is not to pay any certain sum, but such sum as should remain due after two years, deducting the proceeds of certain lands, which the covenanters were to turn into money.

It is true, the plaintiffs say that 600*l.* remained due, after deducting the moneys accruing from the sale of real estates

but we are not told, in direct terms, whether the real estate produced anything or nothing.

At any rate, the defendants plead, as a defence, that the real estate has in fact not been sold, which in my opinion prevents the plaintiffs from claiming any sum as being certainly due to them, till they have replied, setting forth, affirmatively, a sale of the lands, and what they produced; or till they have shewn their inability to sell them, as contemplated by their covenant; and a further question might be raised, whether the plaintiffs should not also in that case aver an offer to reconvey the land, although I am not at present prepared to say that I should consider that indispensable.

Per Cur.—Judgment for defendant on demurrer.

NICHOLS V. RAYNES.

Ten per cent. damages on bills of exchange—On what sum to be paid.

Held per Cur., that under the statute 51 Geo. III. ch. 9, sec. 2, the 10 per cent. damages allowed on protested bills of exchange, is not to be considered as a substitute for the difference of exchange, but is to be paid in addition to the sum paid for the bill, which would always include exchange.

SULLIVAN, J., *dissentiente*.

(Since this decision, the statute 12 Vic. ch. 76, has been passed by our legislature, removing all doubts upon the question, and leaving the law, as in the opinion of the majority of the court it had existed, under the old act.

It appeared in this case that a bill of exchange was drawn by the defendant, in Toronto, upon a person in London, for 300*l.* sterling, in favour of this plaintiff or his order, and indorsed by the plaintiff, for the accommodation of the defendant; of which bill one Green became the holder.

It was returned to Toronto protested for non-payment; and Green, having taken his remedy in separate actions against this defendant as drawer, and against the plaintiff as indorser, they each confessed judgment to Green for the balance claimed by them, after allowing credit for certain payments which the defendant, Raynes, had made on account, before the actions were brought. Raynes not having paid up the claim in full, this plaintiff, Nichols, was obliged to make up the deficiency; and afterwards brought

this action on the common counts against the defendant, for money paid to his use.

It became a question at the trial, whether Green had not claimed and been paid more than he had right to claim; and the defendant endeavoured to shew that the plaintiff, having paid to him money that was not due, had no right to re-claim such amount from the plaintiff. Green had claimed that, under our provincial statute 51 Geo. III. ch. 9, sec. 2, he was entitled to the amount of the premium on exchange, which he had paid for the bill, and also to 10% per cent. damages, besides, interest, charges of postage, and protest; and this was allowed him in the verdict, though the defendant contended against the charge for premium and exchange.

In the calculation that had been made of the amount due when each of these parties confessed judgment, both the premium and 10 per cent. damages were included; and the defendant, as well as the plaintiff, submitted knowingly to the charge, believing it to be legal. The plaintiff therefore only paid on the defendant's account, what the defendant himself had admitted he was liable for; and under such circumstances the learned judge held that he was, at any rate, entitled to recover the amount of the disputed item from the defendant, having received no notice that the defendant excepted to the charge.

The court *nem. con.* held this ruling to be correct.

There was therefore no absolute necessity for going into the question upon the right to recover for the difference of exchange, in addition to the 10 per cent. damages, for, as between him and the plaintiff, the defendant had precluded himself by his conduct from objecting to it.

The Chief Justice, however, proceeded to discuss that question, which had been fully argued upon the return of the rule, and gave it as his opinion, that upon the reason of the thing, and the plain construction of the words of the statute 51 Geo. III. ch. 9, sec. 2, the construction which had been always given to the statute since its passing, was correct, namely, that the 10 per cent. damages was not a substitute for the difference of exchange (which might at

times be the other way), but was to be paid in addition to the sum paid for the bill, which would always of course include exchange.

He held this construction to be clear, and gave his reasons very fully, adding, that even if the point were doubtful, which he thought it was not, yet the construction constantly given to the act by his predecessors, would be regarded by him as binding upon the court.

MACAULAY, J., and McLEAN, J., concurred in this view.

SULLIVAN, J., entered at length into this question, and dissented in opinion from the rest of the court.

DRAPER, J., gave no judgment, being in the Practice Court during the argument.

The legislature has, since the decision of this case, passed an act, 12 Vic. ch. 76, which precludes all possibility of raising such a question in future, and it is therefore considered unnecessary to report these judgments of the court more fully.

QUEEN'S BENCH,

EASTER TERM, 1849, (JUNE 12).

Present,—THE HON. J. B. ROBINSON, C. J.

“ MR. JUSTICE McLEAN,

“ MR. JUSTICE DRAPER.

THE HON. MR. JUSTICE SULLIVAN, being in the Practice Court during last term, gave no judgments.

BOWN V. HAWKE.

Inconsistent pleas—verification.

A plea stating that defendant paid the note on the 31st of December, before it became due, when by the declaration, it appeared that the note fell due in January, 1848—is bad for inconsistency, on general demurrer.—Semble also that such a plea, not denying in precise terms the non-payment as alleged, should conclude with a verification.

Declaration. Payee against maker of a note, made the 3rd November, 1847, and payable two months after the date thereof.

Plea.—That before the said promissory note in the declaration mentioned, became due and payable, according to the tenor and effect thereof, to wit, on the 31st December, 1848, be paid to the plaintiff the sum of money in the said promissory note specified, and the plaintiff then accepted and received the same from the defendant; and this the defendant prays may be enquired of by the country, &c.

Demurrer.—Because the plea improperly concludes to the country, and should conclude with a verification; because the time therein mentioned is inconsistent, and shews payment to have been made after action brought, and is not stated to have been paid or received in satisfaction of damages or costs.

Read for the demurrer. A. McLean contra. The cases cited on the argument were—14 E. R. 300; 2 Tyr. 468; 1 Ch. Pl. 55; Gilbert's C. P. 131; 4 Dowl. 206; 1 M. & W. 362; 3 Dowl. 193; 1 D. & L. 499; 3 C. M. & R. 367; 2 Ch. Pl. 62, note.

ROBINSON, C. J., delivered the judgment of the court.

I think this bad on special demurrer, for the inconsistency in the date, saying that the defendant, on 31st December, 1848, paid the note before it was due, when the note fell due in January, 1848.

I think also that the plea should have concluded with a verification, though that may be doubtful, for generally speaking, payment before the day, becomes payment at the day, when the day has arrived, and non-payment, according to the contract, is included in the breach.

The defendant should have pleaded it according to its legal effect, however—that is, as a payment at the day, and then proof of payment before the day, would have supported his plea, while in form it would have traversed precisely the non-payment stated in the declaration, in which case the plea would have properly concluded to the country.

But this plea, as it is pleaded, is not a precise denial of the non-payment alleged, but a new fact affirmatively pleaded, and should therefore, it seems, have concluded with a verification.

Per Cur.—Judgment for plaintiff on demurrer.

POULTON V. DALMAGE.

Pleadings—introductory part of plea must be limited—Plea, that note was given as a gratuity, &c., good.

A plea must be taken to be pleaded to the *whole* declaration, unless it is confined in the introductory part of it to one or more counts.

A plea "that the promissory note was made by the defendant to the plaintiff *as a gratuity*, and that he, the defendant, never had or received consideration therefor"—is good.

Declaration. 1st count.—Payee against maker of a note.
2nd count.—Interest. 3rd Count.—Account stated.

2nd plea.—And for a further plea, the defendant says that the said promissory note, in the said first count mentioned, was made by the defendant to the plaintiff as a gratuity, and that he, the defendant, never had or received any consideration therefor; and this the defendant is ready to verify, &c.

3rd Plea.—And for a further plea, the defendant says that the said note, in the said first count mentioned, was obtained from the defendant by the fraud and covin of the plaintiff; and this the defendant is ready to verify, &c.

Demurrer to 2nd plea.—Because it was not averred, nor doth it appear in or by the second plea, how or under what circumstances, or for what purpose the said note was made; and also that the said second plea ought to have stated and shewn affirmatively, how there was no consideration or value for the said defendant's making the said note; and also for that the said second plea is too general; and also for that, as the note must be taken and presumed in law, to have been made for value and consideration, and as no fresh facts were stated in the said second plea, the plea ought to have concluded to the country, and not with a verification; and also for that the said last mentioned plea, by its commencement, profess to answer the whole declaration, but in fact is only an answer to the first count of the said declaration.

Demurrer to 2nd and 3rd pleas.—Because the 2nd and 3rd pleas profess to be an answer to the whole declaration, but are in fact an answer only to the first count; and also because it is not shewn in what manner the plaintiff was guilty of fraud, &c.

Richards for the demurrer. *Burns* contra. The cases

cited on the argument were.—2 U. C. R. 399; 3 U. C. R. 360; 1 Bing. N. C. 253; 1 A. & D. 667; 2 M. & W. 72; 13 M. & W. 464; 8 Dowl. N. S. 874.

ROBINSON, C. J., delivered the judgment of the court.

The pleas are both informal and bad, for not being confined in the introductory part to the first count, while they form no defence to the other counts in the declaration.

The rule is clear, that we are now to consider every plea as pleaded to the whole declaration, which is not in the introduction, pleaded in terms as a defence only to part.

The other exception to the second plea need not be considered; but I apprehend there is nothing in it. The assertion that the note was made by the defendant, to the plaintiff as a gratuity, is saying more than that it was merely given without consideration. It sufficiently explains what the defendant means by being made without consideration. Nothing more particular could be stated in such a case, consistently with the truth.

Per Cur.—Judgment for the plaintiff on demurrer.

LYONS V. KELLY.

Pleadings—Malicious Arrest—Averments, denying want of probable cause of arrest.

Case for the malicious arrest of the plaintiff on a *ca. re.* The plaintiff averred in his declaration "that the defendant not having any reasonable cause for believing, and not believing that plaintiff was then immediately about to leave that part of the Province of Canada formerly called Upper Canada, with intent and design to defraud the Bank of British North America (the plaintiffs), &c., made oath, &c., 'that he had good reason to believe, and did verily believe, that the plaintiff was then immediately about to leave Upper Canada, with intent,' " &c. *Held, per Cur.*, on a motion for an arrest of judgment—because these averments did not deny the want of probable cause for the arrest, in such terms as the statute 8 Vic., ch. 48, makes necessary—declaration good.

In an action for a malicious arrest under a *ca. re.*, the plaintiff gave general evidence of his solvency, &c.—no malice was proved on the part of the defendant; the defendant, however, gave no evidence to shew upon what grounds he had arrested, and the jury found the nominal damages of 1s. for the plaintiff. A rule was obtained for a new trial on the evidence, but, under the circumstances, the court discharged the rule.

Case for malicious arrest of the plaintiff on a *ca. ad re.*

The declaration alleged, that the defendant not having any reasonable cause for believing, and not believing, that plaintiff was then immediately about to leave that part of the province of Canada formerly called Upper Canada, with

intent and design to defraud the Bank of British North America (the plaintiffs) of the debt, &c., made oath, &c., "that he had good reason to believe, and did verily believe, that the plaintiff was then immediately about to leave Upper Canada, with intent, &c.

Plea—Not guilty.

The facts of the case are fully stated in the judgment of the court. Verdict for plaintiff, 1s. damages.

Eccles moved for a new trial on the evidence—or to arrest the judgment, on the ground that the plaintiff had not in his declaration denied the want of probable cause for the arrest, in such terms as the statute made necessary. *Vankoughnet* shewed cause. The cases cited on the argument were—8 M. & W. 405; 5 U. C. R. 347; 5 Price, 540; 1 B. & P. 388; 4 Taunt. 7; 6 A. & E. 652.

ROBINSON, C. J., delivered the judgment of the court.

On the evidence, I think we cannot well disturb the verdict. Many witnesses were called who spoke of the plaintiff's character and apparent solvency and standing in business. They spoke in very general terms, it is true, and certainly gave no other ground for imputing any thing like malice to the defendant, than would arise from their not seeming to think him an unsafe person to trust. But there may be cases in which a defendant may be most vexatiously arrested, without the slightest ground for the suspicion which the statute requires should exist in the plaintiff's mind; and yet he might have no other proof to give of the utter want of foundation, than his notorious and unquestionable solvency in the judgment of those who know him best.

The case went to the jury upon a charge as favourable to the defendant as could properly have been given; and as the jury probably received the same impression from the evidence as we have done, it would have been better that they had found a verdict for the defendant, on the ground that they were not satisfied that the defendant had acted from malice, rather than have given, as they have done, a verdict for the plaintiff, with 1s. damages.

If they believed that the defendant maliciously caused the the plaintiff to be arrested, when he knew there was no just

cause for it, they ought to have given substantial and not nominal damages. If they did not believe that the defendant acted in that spirit, they should have acquitted him. They were plainly directed to that effect. What view they really did take of the evidence is not known to us; but we must consider, on the other hand, that the defendant called no witnesses, and made no attempt whatever to shew a foundation for the belief which he swore to. Under these circumstances we do not set aside the verdict.

As regards the grounds on which the defendant has moved in arrest of judgment, the exception is that the plaintiff has not, in his declaration, denied the want of probable cause for the arrest, in such terms as the statute makes necessary.

The statute 8 Vic. ch. 48, sec. 44, requires that the plaintiff shall swear that he had good "*reason to believe and does verily believe*, that the defendant is about immediately to leave Upper Canada, with intent and design to defraud the plaintiff of his debt," and the affidavit that was made in the case closely follows the statute.

The ground of action laid is, that the defendant, not having "*any reasonable cause* for believing, and not believing that the plaintiff was then immediately about to leave that part of the province of Canada formerly called Upper Canada, with intent and design to defraud the Bank of British North America of the debt," made the affidavit which he did, and which the statute requires.

Instead then of averring that the defendant *had not good reason to believe*, the declaration avers that *he had not any reasonable cause for believing*. There is no authority for holding that the plaintiff was strictly bound to follow the very words of the act. The averment is not matter of description. The plaintiff, no doubt, must keep up to the meaning of the statute fully in its exact sense; and we think he has done so; for if the defendant had *not any reasonable cause for believing* what he swore, he could not possibly have had *good reason* to believe it: There can be no good reason to believe, where all reasonable cause for believing is wanting.

The other variance pointed out, is as to the apprehended departure of the debtor "from that part of *the province of Canada formerly called Upper Canada*," instead of using the words "Upper Canada" only, as the statute does.

There is nothing in that variance, for we must notice the limits of our own jurisdiction, and we know that Upper Canada can mean nothing else than that part of the province of Canada formerly called Upper Canada. It is an unnecessary circumlocution, which makes no difference in the sense. It was unnecessary, because there is a country known as Upper Canada, since the union as well as before.

It was further objected, that the declaration does not aver that the defendant *maliciously* sued out a writ; but it does aver that he maliciously made the affidavit on which the writ issued, and that he maliciously caused the plaintiff to be arrested, not having any probable cause for doing so, and this gives a sufficient ground of action.

Per Cur.—Rule discharged.

DAVIS V. FORTUNE.

Agent for creditor making the affidavit to arrest on ca. sa. — his liability therefor—setting aside verdict for the plaintiff.

An agent of a creditor making an affidavit upon which the debtor is arrested on a *ca. sa.* is liable to an action on the case—for *causing the writ to be sued out*, and to be endorsed and delivered to the sheriff and the debtor to be arrested and imprisoned thereupon—though the jury expressly find, upon that point being submitted them, that the agent did nothing more than make the affidavit.

Though the Court may think that under the facts proved, in an action on the case for a malicious arrest, a verdict for the defendant would have been more proper, than for the plaintiff, yet if no clear or precise ground has been shewn by the defendant for the suspicion sworn to in his affidavit, and there has been no misdirection on the part of the learned judge at the trial, they will not set aside the verdict.

Case for malicious arrest of plaintiff on a *ca. sa.*, from the District Court, at the suit of Francis M. Hill.

The declaration alleged, that the defendant on the 30th of March, 1848, not having any reasonable cause for believing that the plaintiff had made any secret or fraudulent conveyance of his property in order to prevent its being taken in execution, maliciously made an affidavit, that he had reason to believe, that he and two other persons, defendants in the said suit in the District Court, had parted

with their property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution ; and that afterwards, viz., on the 4th April, 1848, the defendant, not having any cause to believe, &c., wrongfully and maliciously, by virtue of said affidavit, caused a writ of *ca. sa.* to be sued out of the District Court of the District of Victoria (setting out the writ), and maliciously caused it to be endorsed, &c., and to be delivered to the sheriff to be executed ; and that afterwards, viz., on the 22nd April, in the year aforesaid, maliciously intending to injure the plaintiff, and without having any reasonable or probable cause for disbelieving, &c., he maliciously caused the now plaintiff to be arrested under and by virtue of the said writ, and to be imprisoned until he obtained his discharge by giving bail for the limits—and that plaintiff was afterwards obliged to pay the sum endorsed.

The declaration then averred, that in fact the defendant, *at the time of suing forth the said writ*, and of the said arrest and imprisonment, and after the said imprisonment on the limits, had not any reasonable or probable cause for suspecting or believing that the now plaintiff had parted with his property, or made any fraudulent and secret conveyance thereof, in order to prevent its being taken in execution, and lays damage arising from his imprisonment.

The defendant pleaded “not guilty.”

The evidence shewed that this defendant on the 30th March, 1848, made an affidavit at Cobourg, in the district of Newcastle, in a cause in the District Court there, between Hill, plaintiff, and Macaulay, Davis and others, defendants ; in which calling himself *agent for the plaintiff Hill*, he made oath in the usual form, that he had reason to believe that Davis and two others of the defendants had parted with their property, or made some fraudulent or secret conveyance thereof, in order to prevent its being taken in execution.

On this affidavit a *ca. sa.* was taken out against the now plaintiff, Davis, and he was arrested in the district of Victoria, and kept in custody a few hours till he gave bail for the limits. About a month after, he paid the debt and was discharged.

Verdict for plaintiff, 26*l.* damages.

Vankoughnet obtained rule for a new trial on the law and evidence. *Richards* shewed cause.

Cases cited—2 Stark. Ev. 688 ; 5 C. & P. 4 ; 3 M. & P. 12 ; 6 A. & E. 652 ; 1 C. M. & R. 223 ; 16 M. & W. 200 ; 11 Jurist, 1020.

ROBINSON, C. J., delivered the judgment of the court.

So far as merits were concerned, there seemed little pretence for the action ; for the plaintiff, it appeared, had a comfortable income, but yet refused to pay the debt, or even his proportion of it ; saying in a manner rather aggravating to a creditor, that he had no goods, and he should not trouble himself about it. The result shewed that, in this instance, the coercion was requisite, for it procured the payment of what was not denied to be an honest debt, though, till the arrest was resorted to, this plaintiff seemed very indifferent about paying it.

It was objected at the trial that the evidence did not shew this defendant liable for the arrest, for he was not proved to have done anything more than make the affidavit as agent for the creditor. He does not appear to have had any concern with the suit or with the process ; and the jury expressly found, on the point being submitted to them, that he did nothing more than make the affidavit. All the allegations therefore in the declaration, of his having sued out the writ, caused it to be endorsed and delivered to the sheriff, of his having caused the now plaintiff to be arrested and imprisoned, were unsupported by any other proof than that of his having gone before a commissioner in Cobourg and made the affidavit. Who sued out the process and transmitted it to the other district, was not shewn.

Nevertheless, the jury can only be taken to have meant by their finding that it was not proved that defendant had done any other act than make the affidavit, not that he had done anything to interfere with the purpose for which we must suppose the affidavit was made, or to prevent his act, in making it, from having its ordinary effect in causing a writ to issue. The defendant, therefore, did that as agent for another, without which the writ could not have issued

upon which the plaintiff was imprisoned ; and as he did nothing to intercept or prevent the consequences which would naturally follow, he must be considered, in this action on the case for the consequential injury, to have caused the imprisonment, since he did that, without which it would not have taken place, and in consequence of which it did take place.

In *Hewson v. Carr*, 2 Starkie's Cases—in an action for malicious prosecution, the defendant's counsel contended for the necessity of proving the information, since that, he maintained, was the *best evidence* to shew who caused the warrant to be issued.

I have considered whether, after the finding of the jury, that the defendant did nothing more than make the affidavit, there was a sufficient cause of action supported by proof, and I think there was, for that we can only understand the jury to find, that nothing had been proved to them either to repel or to strengthen the legal inference to be drawn from the fact of making the affidavit.

The case of *Daniels v. Fielding*, 16 M. & W. 200, has no application here, for this arrest was not authorized by any discretionary order of a judge exercised upon the contents of the affidavit, as is now the case ordinarily in England.

We have considered the application for a new trial on the law and evidence.

A verdict for the defendant, would, I think have been more proper, viewing all the circumstances ; but considering that the affidavit is of that kind, that seems to give a right to a debtor to call upon the plaintiff, to exhibit some ground for the very particular suspicion sworn to, and that no clear or precise ground was shewn in this case ; and considering also, that there was no misdirection, and that we could only properly grant a new trial upon the evidence, on the condition of paying costs, we are of opinion that we ought not to open the matter by setting aside the verdict.

The case was one in which the defendant should reasonably have been allowed to make use of process against the person for obtaining satisfaction, which it seems the plain-

tiff could make, though without that kind of coercion, he seems very unlikely ever to have made it. There was, therefore, nothing oppressive in fact, in the use of the process on such an occasion; but yet the statute requires certain facts to be sworn to, before the *capias* can issue, and it certainly was not clearly shewn what ground this defendant had for making such an affidavit. The question of malice was for the jury.

Per Cur.—Rule discharged.

PERRY V. RICHMOND.

Immaterial issues—costs of the cause: Application for judgment notwithstanding—or to arrest judgment—when may be made.

Held per Cur.—That the issue tendered by the 4th plea, that *no deed of assignment of the said supposed indenture of lease was ever granted, assigned and set over by the plaintiff to the defendant, and of this, &c., is an immaterial issue—and though found for the defendant, does not deprive the plaintiff of the benefit of his verdict on the other pleas, and of full costs in the cause.*

Semble, that applications for judgments *non obstante*,—or to arrest judgments, are not limited with us, as in England, to the first four days of the term next after the assizes.

The plaintiff declared in *assumpsit*—specially setting forth, that on the 24th December, 1836, by indenture then made between King's College, and the plaintiff, King's College demised to plaintiff, his executors, &c., and assigns, lot 11, in 7th Concession of Cramahe, to hold for 21 years, yielding for the first 7 years 5*l.* yearly, and for the last 7 years 7*l.*10*s.* yearly, payable on the 24th December in each year; and that the plaintiff thereby covenanted to pay the rents according to the lease—that by virtue of that demise, plaintiff, on 24th December, 1836, entered, and became possessed; and on 15th October, 1839, the plaintiff, "*by a certain deed of assignment then duly executed by the said plaintiff, and endorsed on the back of the said indenture of lease, in consideration of 20*l.*, bargained, sold and set over to the defendant the said indenture of lease, and the premises thereby demised, for the residue of the said term;*" and that defendant then and there accepted the said assignment, and by virtue thereof, on 15th October, 1839, entered and became possessed for the residue of the said term.

The plaintiff then averred that he had performed all the

covenants in the said indenture of lease on his part, and that *after the said assignment of the said indenture of lease from him to the defendant*, and after the defendant accepted the same, and entered and continued to hold and enjoy the premises under and by virtue of the said lease and assignment, there became due to the said lessors (King's College) a certain sum, viz., 8 years' rent, under the plaintiff's covenant for 8 years' rent, ending on 24th December, 1847, and that it was the duty of the defendant, as such assignee, to pay the said rent to the College; yet the defendant did not pay the same, by reason whereof, plaintiff was afterwards, on the 1st June, 1848, obliged to pay, and did then pay the King's College a portion of the said rent; to wit, 2*l.* 10*s.*, being part of the said rent so fallen due, &c. And that for the residue, the plaintiff, on the 3rd of August, 1848, gave to the Chancellor of King's College his promissory note, viz., for, &c.; by means of which premises he averred, the defendant became liable to pay him 30*l.* in the declaration mentioned and being so liable afterwards, &c., promised to pay.

Pleas.—1st,—*non assumpsit*.

2nd,—That the Chancellor, President, and Scholars of King's College, did not by any indenture dated 24th Dec., 1836, demise to plaintiff, nor did the plaintiff covenant with them to pay the said supposed rent, &c.

3rd,—That the plaintiff did not by any deed of assignment duly executed by the plaintiff on the said 15th Oct., 1839, indorsed on the said supposed indenture of lease, in consideration of 20*l.*, bargain, sell and set over to the defendant, the said supposed indenture; nor did the defendant on the said day, &c., enter on the said premises, nor became possessed thereof as in the declaration mentioned.

4th,—That *no deed of assignment of the said supposed indenture of lease was ever granted, assigned and set over by the plaintiff to the defendant, and of this, &c.*

5th,—Set off. Plaintiff took issue on these pleas.

At the trial, the lease from the College to the plaintiff was proved; on the back was endorsed an assignment, 15th

October, 1839, in consideration of 20*l.* from the plaintiff to the defendant, to which the plaintiff's signature was proved. There was no seal to it, nor any appearance of there having been a seal. The plaintiff asked leave to amend his declaration, laying the assignment as it was i. e., not under seal ; but leave was not given to him.

It was proved that defendant entered on the land after the assignment, and about two years afterwards, assigned to some third party. The plaintiff shewed that he had been obliged to pay the College 7*l.* 10*s.*, and to give his notes (which indeed was admitted on the record) for a larger sum. The 7*l.* 10*s.* was for three years' rent, for 1838, 1839 and 1840, and included one years' rent (that for 1840) for the time that defendant held under the assignment, and before he had sold his interest.

The Chief Justice, who tried the cause, did not consider that plaintiff could recover in this action, for anything on account of his notes which he had not yet paid, but only for the 2*l.* 10*s.*, and he received a verdict for that ; the jury finding for the plaintiff on all the issues except the *fourth*, and on that, for the defendant. The general issue, he held, prevented the plaintiff's recovery in respect of the promissory notes, as no assumpsit in respect of the money covered by them, was implied or proved.

The master, at the entry of judgment, taxed for plaintiff the costs of the cause, and on 14th December, 1848, the defendant obtained an order from Macaulay, J., for revision of taxation, limiting the plaintiff's costs to the costs of the issues found for him ; and in Michaelmas Term following, the plaintiff obtained a rule *nisi* that plaintiff should have judgment and full costs, notwithstanding the finding of the jury on the fourth issue, on which the defendant had a verdict, or why the judge's order should not be rescinded.

Read, moved for judgment *non obstante verdicto*, and to rescind the judge's order. *Richard's* shewed cause.

The cases cited were—Stephens' Pl. 282 ; 2 Saund. 317, 319 (6) ; 2 Bing. N. C. 704 ; Cr. & M. 644 ; 5 Burr. 2827 ; 4 Bing. N. C. 439 ; 4 B & C. 380 ; 3 Q. B. R. 602 ; Vent. 196 ; 3 M & W. 159 ; 1 Ch. Rep. 121.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, that the plaintiff should be allowed to tax his full costs, and have the benefit of his verdict, notwithstanding the jury found for the defendant on the fourth issue. We cannot hold that the plaintiff is too late in applying for judgment *non obstante*, because we have, in that respect, the same practice that prevailed in England in the King's Bench; before the new rule H. T. 2 Wm. IV. It might be well that we should adopt that rule which limits motions to arrest judgment, and motions for judgment *non obstante*, to the first four days of the next term after the trial; but we have not yet done so.

Then we have here the jury finding on the third issue, that the plaintiff *did*, by deed of assignment, indorsed on the indenture of lease, bargain, sell and set over to the defendant the said supposed indenture," while on the fourth issue they find "that *no deed of assignment* of the said supposed indenture of lease, was ever granted, assigned, and set over by the plaintiff to the defendant."

There is an apparent inconsistency in the finding on these two issues; but the fourth plea is so worded that it is not easy to understand what it denies—whether that no deed of assignment was ever *made*, or that the *deed of assignment* was *never transferred*—which latter would be an absurd and immaterial issue. Neither of the pleas applies to the material question, whether the term or *interest* in the land was assigned, but they assert that the *deed* was not assigned.

The declaration averred that the plaintiff had assigned to the defendant the indenture of lease, *and the premises thereby demised*, which latter was the substantial statement that should have been traversed.

Unless the fourth plea can be said to have traversed that, it can be no defence: and if it can be taken as traversing that, then, although the plaintiff had stated the assignment to be by deed, yet as it might equally have been by writing without seal, I consider that the substance of the issue was, whether the plaintiff had assigned the premises to the defendant for the residue of the term (5 Burr. 2827), and on that principle, if it could be extended to this case, the

fourth issue should have been found for the plaintiff; because an assignment was proved, though not under seal, which it need not be. But that issue having been in fact found for the defendant, the question is, whether it is in law a bar to the action; and I think it is not, because it does not deny the assignment of the plaintiff's interest in the land, but at most only denies the assignment of the deed of lease, if indeed it can be taken to do anything more than deny the assignment of *the assignment*, which was not a fact averred, and could have nothing to do with the cause of action stated. It leaves unanswered the averment in the declaration, that the *premises* were assigned.

For all that is stated in the plea, the plaintiff may have assigned the premises to the defendant, though not the deed of lease, and there is therefore not enough pleaded to bar the action.

The fourth plea is indeed otherwise bad (though perhaps in this respect only informal), for it does not precisely deny even the assignment of the lease alleged, but says *no* deed of assignment was ever granted, &c., by plaintiff to him, which is only an argumentative denial of the particular assignment set out.

Per Cur.—Rule absolute.

COCHRANE V. EYRE ET AL.

Debt on recognizance—insufficient pleas thereto—sufficiency of declaration—recognizance when taken in open court of District Court, need not be filed.

Seem, that a recognizance taken in the District Court, may be sued on in the Queen's Bench.

When a recognizance has been taken in *open* court before the judge of the District Court, and it is so averred.—*Held per Cur.*—that under the 8th Vic. ch. 13, secs. 20, 23 and 50—the *filing* of the recognizance in the office of the clerk, is not necessary to perfect it.

Declaration: Debt on recognizance.

1st plea—That there is not any record of the said supposed recognizance in the declaration mentioned remaining in the said court here, in manner and form as in the declaration is alleged; and of this defendant puts himself upon the country, &c.

2nd plea.—That defendants were not, nor are they indebted

to the plaintiff in manner and form as in the declaration is alleged; and of this they put themselves upon the country, &c.

3rd plea.—That after the recovery of the judgment in the declaration mentioned against the said Alexander Porter, and after the issuing of the writ of *capias ad satisfaciendum* against him, and before the return thereof, he, the said Alexander Porter, fraudulently departed from, or concealed himself in the District of Newcastle, so that the defendants, as such bail for him, could not render him to the custody of the sheriff of the said district in discharge of themselves; and this they are ready to verify, &c.

5th plea.—That after the issuing of the writ of *capias ad satisfaciendum* upon the said judgment, and the delivery thereof to the sheriff of the District of Newcastle, and whilst the same was in force, the said sheriff could, and might, and would have arrested the said Alexander Porter, but that the plaintiff fraudulently, and for the purpose of fixing the defendants, ordered and directed him, the said sheriff, not to do so; and this the defendants are ready to verify, &c.

Demurrer to 1st plea.—Because the same improperly concludes to the country instead of with a prayer of judgment, and the defendants thereby attempt to put in issue the existence of a recognizance in the Court of Queen's Bench, whereas the plaintiff has declared on a recognizance in the District Court.

To 2nd plea—Because the same is not a formal or proper plea, to an action of debt on recognizance.

To 3rd plea—Because the same contains no defence to this action, but on the contrary, admits the cause of action declared on—that though the said plea may shew a reason for not rendering the said Alexander Porter to the custody of the sheriff, yet it contains no excuse whatever for not paying the condemnation money.

Replication to 5th plea—That he did not order and direct the said sheriff not to arrest the said Alexander Porter, in manner and form as the defendants in their said plea have alleged; and this the plaintiff prays may be enquired of by the country, &c.

Demurrer to replication to 5th plea—Because the plaintiff hath thereby denied, in the conjunctive, the allegation contained in the said plea, that the plaintiff ordered *and* directed the sheriff not to arrest the said Alexander Porter, and thereby raised too large an issue, instead of denying that he either ordered *or* directed the sheriff not to do so.

Upon the argument of the demurrers, the defendant took the following exceptions to the declaration :—

1st—Because, by the recognizance as therein set forth, the defendants are shewn to have undertaken to answer for their principal, if he should be condemned at the suit of the plaintiff, in an action on promises to the plaintiff's damage of 25*l.*; and the recovery set forth is for 36*l.* 15*s.* 8*d.*

2nd.—Because there is no averment in the declaration, that the recognizance or affidavits were filed with the clerk of the District Court.

3rd.—Because the record of the recovery, &c., is averred to be remaining in the said court here (meaning *this* court).

4th.—Because the recovery or cause thereof is not alleged to have been within the jurisdiction of the District Court.

Cameron, Q. C., for the demurrer.—*Eccles*, contra.

The statute referred to was the 8th Vic. ch. 13, sec. 20, 23 & 50—no authorities were cited.

ROBINSON, C. J., delivered the judgment of the court.

There can be no doubt, but that the first, second and third pleas are all sufficient, for the reasons stated in the demurrer; and that plaintiff's replication to the 5th plea, which is demurred to, is good;—so that the plaintiff is entitled to judgment in regard to all the demurrers; but the defendant, upon the argument, took exception to the declaration, as being insufficient on several grounds.

First—Because the condition of the recognizance set out in it, makes the cognizors liable only in case the principal shall be condemned in an action on promises, to the damage of the plaintiff of 25*l.*, then depending, &c.; and the declaration sets out a recovery for 36*l.* 15*s.*

There is nothing wrong in this. The action was for 25*l.* damages, as the plaintiff avers it was. The declaration is

only describing it as the recognizance had described it, and both must recite it truly. The judgment obtained in the action, of course, includes the costs, and so was for 36*l*.

And secondly—Exception was taken, that there is no averment in the declaration that the recognizance or affidavits were filed with the clerk of the District Court.

The 20th, 23rd and 50th clauses of the District Court Act, 8th Vic. ch. 13, relate to this matter. No objection was taken that an action will not lie in this court, on a recognizance taken in the District Court. Of course it will lie here, if there is no enactment to prevent it; and the 50th clause does not, I think, confine the jurisdiction to the District Court in such cases.

We do not consider that the 23rd clause can be reasonably taken to require the filing in the office of the clerk, as an act necessary to perfecting the recognizance, when it was taken in open court before the judge, as this is averred to have been.

That provision can only, in the nature of things, have been meant to apply to recognizances taken out of court. It is copied from a like provision made in the King's Bench Act, in respect to recognizances taken before commissioners in the country, and the same commissioners are by this act empowered to take bail in the District Court.

It is impossible that a recognizance taken in a court of record, can be otherwise than a record in itself. It cannot be more a record by being filed in the office by the same officer who, under the direction of the judge, has taken it *sedente curia*.

Another objection taken is, that the record of the recovery is averred to be *remaining* of record in the said court *here* (meaning *this* court, which would be repugnant to what was before averred); but the declaration does not so state the matter—on the contrary, it plainly refers to the record as remaining in the District Court.

And so also as to another objection taken: It is not founded in fact; for the declaration does aver (whether necessarily or not), that the action in which plaintiff recovered was within the jurisdiction of the District Court.

We see no ground on which the declaration should be held bad, and the plaintiff, in our opinion, is entitled to judgment.

Per Cur.—Judgment for the plaintiff on demurrer.

THE QUEEN V. WISMER.

Dedication of a road by tenant—Landlord's acquiescence.

A tenant for years cannot, by acquiescence, or otherwise, dedicate a portion of the leasehold for a public highway, so as to bind the reversioner. *Semble*: that where the reversion comes at once, without any interval of time to the tenant, his acquiescence in the dedication, while a tenant, will not bind him, in the absence of evidence of acquiescence in the dedication on the part of his landlord. Where therefore a tenant under the crown had been convicted upon an indictment for taking exclusive possession of the road, after he had obtained his patent.—The court refused to give judgment upon the conviction until evidence had been given to shew the crown a consenting party to the dedication.

The defendant in this case was tried upon an indictment for nuisance, in obstructing a highway in the township of Markham, and the jury found him guilty.

Both the prosecutor and the defendant, it seemed, desired to have the opinion of this court on the question whether the *locus in quo* was a legal highway, and with this view the indictment was brought hither by *certiorari*, no judgment having been given on the verdict.

The facts of the case fully appear in the judgment of the court.

A. Wilson for the crown. Dr. Connor for the defendant. The cases cited on the argument were—4 Camp. 16; 6 D. & R. 572; 5 Taunt. 12; 5 B. & Ald. 454; 1 M. & Gr. 392; 4 Tyr. 502; 1 Bing. N. C. 553; 5 C. & P. 460; 10 Bing. 78; 7 B. & C. 257; 11 E. R. 376, 419.

ROBINSON, C. J., delivered the judgment of the court.

It appeared on the evidence taken at the trial, as reported by the learned judge who presided, that in the original survey of the township of Markham, there was a public allowance for road between the defendant's lot 15, in the 7th concession, and the adjoining lot 16.

The road, which has in fact been opened as and for the public allowance, has been in use for 25 years and more. Statute labour has been performed on it by this defendant,

as well as others, as upon the proper public highway. Of late, however, the defendant had objected that the road is not correctly laid out according to the intention of the original survey, but encroaches upon his land; and finding this to be the case, on having the side line of his lot run parallel with the township line at the end of that concession, he claimed a right, notwithstanding the long use of the highway in its present line, to have it confined to the proper public allowance; and in order to try the right, he extended his fence to the true northern limit of his lot, thereby shutting the public out of the greater part of the width of the old road, though not entirely closing it up.

Supposing, which we infer from the evidence in the case, that the deviation from the right line was not compelled by any necessity occasioned by the nature of the ground, and was not even intentional, but has been accidental arising from want of accuracy in laying out the road, then there would seem to be no good reason why the error should not be corrected, and the road laid out in its right place by the proper authorities.

That would be just towards the defendant, as it would give the proprietors on each side of the road their proper boundary, and the line of road would in itself be more direct and convenient.

Whether any attempt has been made to settle this dispute by such an arrangement, we are not informed; but after some delay in bringing the matter before us, we are pressed to give judgment upon the conviction. And the first difficulty that presents itself is, that the jury appears to have given the verdict upon an imperfect knowledge of the facts of the case; for it would appear by the report of the trial, that it was assumed by the learned judge in giving the case to the jury (and there was nothing in the evidence to lead to any other impression), that during the 25 years that the *locus in quo* had been constantly used as a highway with the assent of the defendant, he was himself seized of the land in fee. Now, however, it is brought out for the first time, as a new fact, that up to the year 1842, the fee of the *locus in quo* was in the crown.

The defendant, it appears, had a lease from the crown of the lot of which the *locus in quo* forms a part, being a clergy reserve, which lease, being for 21 years, expired some time before 1842; but having entered as lessee and enjoyed as lessee during the period the lease was running, he continued in possession till he purchased from the crown in 1842, when he received a grant of the fee under the great seal.

So we have here the defendant, while lessee for years of the crown, allowing the public freely to use the *locus in quo* as a highway for 25 years (that is, being such tenant for part of the time, and the rest of the time holding over), and then, in 1842, receiving a grant of the fee from the crown, soon after which he takes upon himself to assert an exclusive right, and shuts out the public. This places the case in a new light, different from that in which it was supposed to stand at the trial. Upon the evidence there given, I should say, there could be no question that the defendant was rightly convicted.

Now a new fact is stated, which was not proved at the trial, or if proved, not noticed or understood, though fully admitted before us at present, as well on the one side as the other. We cannot pass sentence on a conviction so obtained; for, undoubtedly, the general principle is, that a tenant for years cannot by any such act of dedication as is shewn here, bind the reversioner.

He could not affect the right of the crown, as regarded the reversion, by any dedication of that which was not his own. And it is now contended, on the part of the defendant, that it must follow as a consequence that he can claim under his grant the same right of exclusive possession as the crown had when the grant was made.

If it can be successfully maintained, on the other hand, that the defendant having while tenant acquiesced so long in the public use of the road, is bound by his acquiescence when the reversion comes to him without any intermediate interval of time, though no other grantee of the reversion would have been; then, on that principle, the conviction might still be held to be proper. But we do not find autho-

rity sufficient to support that position, in the absence of evidence of acquiescence in the dedication on the part of the crown. And it is plain, that if the conviction could only be supported by establishing such acquiescence (and we think it could be no otherwise supported), then it will be necessary to satisfy a jury on that point, for it is not the province of the court to find the fact.

It will be necessary, therefore, that there should be another indictment preferred, if the obstruction still continues, in order that the case may be submitted to a jury on its proper grounds; unless the parties concerned should take the more reasonable course of having the road properly laid down and established in the true line.—See 13 E. R. 411.

Per Cur.—Conviction cannot be supported—
New trial ordered.

THE QUEEN V. RYAN.

Ineligibility of collectors of taxes under 1 Vic. ch. 21 sec. 18—application for a quo warranto by a person evidently disqualified for the office.

Under sec. 18 of the statute, 1 Vic., ch. 21—a collector of rates who has not paid over the amount collected by him, and settled his accounts with the treasurer on or before the third Monday in December of the year for which he has been serving—is ineligible to any township office. The court refused an information in the nature of a *quo warranto*, with a view to place a party in the office of a township clerk, who, in making his application, shewed that he could not write.

Cameron, *Q. C.* obtained a rule *nisi* for a *quo warranto*, to determine by what right the defendant filled the office of township clerk of the township of Biddulph, in the district of Huron.

James Hodgins, the younger, made affidavit, that at the township meeting for Biddulph, on the 1st January, 1849, he was elected township clerk for that year; that Ryan opposed him, but that he was ineligible to any township office, not having made his returns to the treasurer of the district as collector of taxes for the township of Biddulph, for 1848, within the time prescribed by law; that there was a division and shew of hands at the election, and that a protest was entered and handed to the chairman of the meeting before any division or shew of hands took place,

for that cause; and that notice was given to the electors previous to, and at the time of the division and shew of hands, that any votes given to Ryan would be thrown away on account of his ineligibility; that he, Hodgins, had entered into the bond required by 1 Vic., ch. 21, sec. 11, as township clerk, which had been transmitted to the treasurer of the district according to law; that he had demanded the township books and papers from Ryan, which came into his possession at the meeting, who refused to deliver them.

To this affidavit the deponent made his mark as a person who could not write. The protest is put in signed by nine persons.

James Hodgins, sen., swore that he was at the election, stated the delivery of the protest after the candidates were proposed, and before any division or shew of hands, (see 1 Vic., ch. 2, sec. 18,) that upon the division and shew of hands, Ryan was declared by the chairman to be elected, but that deponent verily believed James Hodgins, jun., to be the duly elected clerk.

John and Adam Hodgins made affidavit, that on a division and shew of hands, Ryan had a majority; and that notice was given to the electors upon such division and shew of hands that the votes given for him would be thrown away on account of his ineligibility, that they had respectively proposed and seconded James Hodgins, jun.; that upon the shew of hands, the chairman declared Ryan duly elected, in the face of the protest of the freeholders; and they swore that they verily believe James Hodgins, jun., to be the duly declared township clerk for 1849.

An affidavit of the treasurer was put in, that Ryan, as collector of Biddulph for 1848, did, on the 3rd of January, 1849, pay over all money collected by him in 1848, and relieved his bond as collector; and did not pay over and finally settle his account as such collector as aforesaid, with him as treasurer, on or before the third Tuesday in December, 1848.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt but that the statute 1 Vic., ch. 21, sec. 18,

does render ineligible to any township office a collector of rates who has not paid over the amount collected by him, and settled his account with the treasurer, on or before the third Tuesday in December of the year for which he has been serving; and therefore it does appear that Ryan was ineligible when he was chosen, and ought not to have been returned in the face of the objection openly made.

On the other hand (though that is not a matter that can have any retrospective effect in making that proper and legal now, which was illegal at the time it took place), yet it is shewn that almost immediately after the election, Ryan acquitted himself of his trust, and has obtained the treasurer's discharge. This does not alone weigh with us in declining to grant this application; but there is another rather strange circumstance in the case, which is the evident and utter incapacity of Mr. Hodgins, who desires to be placed in the office. He makes his mark to the affidavit filed in support of this application, from which, the only inference we can draw is, that he can neither write nor read; for it is very rare that a person can read, who cannot even write his name.

It would be using the discretion of this court unwisely to grant leave to file an information in the nature of *quo warranto*, with a view to place in the office of *township clerk* a person who cannot write, when his duties are all of that nature, which make such a qualification indispensable. Among other things, he is to record the proceedings at all township meetings. The court clearly hold in England that it has a discretion to withhold leave, and it would be answering no useful purpose to grant the present application. We did not observe the circumstance I have mentioned, or we should not have granted the rule *nisi*.

Per Cur.—Rule *nisi* for *quo warranto*, discharged.

DOE DEM. CONNOR V. CONNOR.

- A. received possession of land from B.—A. died in 1846, and before his death, A. and B. had been in occupation of the land for more than 20 years—A. died without issue and intestate, leaving his wife upon the land—C. his eldest brother, and heir at law, claimed title, and brought ejectment against A's. wife—A's wife defended the action,.

relying upon a *quit claim deed* from B., who, upon giving up possession to A., had exchanged lands, and never having given A. his deed as was alleged, now conveyed to his wife. But, *Held per Cur.*—that A's. wife, upon the death of her husband, being merely a tenant at sufferance—and having no interest upon which a simple release could operate—the release conveyed nothing, and the plaintiff was entitled to recover.

Ejectment for west half of 28, 6th concession, Kingston.

The facts were these:—John Connor, about 20 years ago, or nearly so, went to live on the premises in question, which before had been occupied by Andrew Kerr, from whom he received possession—they having exchanged lands. There had been a continued occupation between the two, without interruption, for more than 20 years, before 1846, in which year John Connor died, without issue, and, as it appeared intestate, leaving his wife Margaret Connor, the now defendant, living upon the land.

The lessor of the plaintiff, Aaron Connor, was eldest brother and heir of John Connor. This was his evidence of title.

The defendant produced first a patent from the crown to Alexander Aitkin, made 19th April, 1798, for this land. She then produced and proved a deed-poll from Andrew Kerr to her, dated 12th January, 1847, registered 11th June, 1848, whereby, for the consideration of five shillings, he “assigned, demised, released, set over, and quit claim to her, her heirs and assigns forever, all his estate, right, title and interest,” of and in the premises now in question.

How Kerr became entitled to the land, was not shewn—there was no title traced down from the patentee Aitkin.

One Gow, one of the subscribing witnesses to the deed from Kerr to the defendant, swore on the trial, that about a year before John Connor died, he heard him say to Kerr that he depended on him to give a deed; and that he had often heard him say he had told his wife that she must trust to the mercy of Kerr for a deed. Kerr had been long living in the Township of Marysburgh, the land which he had got from John Connor in exchange for this 100 acres. He died before the trial. William Kerr, a son of his, was a subscribing witness to the deed with Gow, and was also examined on the trial. He swore, as Gow did, that the deed was executed at Kerr's residence, in Marysburgh, and

it seems that after John Connor's death, which was known to Kerr, Gow had gone up to Kerr and got him to execute the deed, which Kerr's son drew up.

The defendant claimed under this deed, as being given to her by Kerr in fulfillment of the known intention of her husband, to whom he was bound to convey.

The plaintiff on the other hand, endeavoured to establish that the taking of this deed from Kerr was a fraudulent contrivance to defeat the title of the lessor of the plaintiff as John Connor's heir.

It was not made out that Kerr had ever made a deed to John Connor in his life time, though it was endeavoured to be shewn that he had, and he produced a witness who swore that about 14 years before, he saw in John Connor's possession, a deed to him from Kerr, for this land, or what he thought was a deed, though he was not sure of it. The character of this witness, however, was impeached as unworthy of credit.

The jury were directed to find for the plaintiff, if they were satisfied that a deed had been executed to John Connor by Kerr; if not, then to find for defendant if they believed that the deed produced from Kerr to her, was executed, as stated by the subscribing witnesses.

The plaintiff's counsel had objected that the deed made by Kerr to defendant, could pass no interest, the grantor not being then in possession, and there being no consideration given for it; also, that as the possession of the defendant (the widow) came to her through her husband, she could not take a deed, while thus in possession, in order to defeat the heir's title, but must first relinquish possession to the heir.

Verdict for the defendant.

Hagarty, obtained a rule for a new trial on the law and evidence, and for the admission of illegal evidence. *McKenzie* shewed cause.

The cases cited were—4 U. C. R. 508; 4 N. & M. 25; 8. B. & C. 471; 5 Taunt. 326; 2 T. R. 749; *Butcher v. Butcher*, 7 B. & C.; 2 N. & P. 123; 4 M. & Scott, 562; 9 Taunt. 202; *Woodfall*, L. & T. 37, 578; 2 N. & P. 594;

1 Cr. & M. 543 ; 1 U. C. R. 39 ; 3 M. & S. 271, 506 ; 4 Wm. IV., ch. 1, sec. 42 ; 3 M. & Ry. 111 ; 3 P. & D. 194 ; 2 Saund. 418 ; 1 P. & D. 651 ; 11 M. & W. 337 ; 1 M. G. & Scott, 77.

ROBINSON, C. J., delivered the judgment of the court.

No difficulty arises, in this case, from the production of the patent, by which the land in question was granted to Aitkin in 1798 ; for no privity, whatever, being shewn between Aitkin or his heir, and those who have held possession of the property for more than 20 years, we must look on that title as extinguished.

Then the lessor of the plaintiff shewed that his brother, John Connor, and Kerr, from whom he claimed, had in succession been in actual occupation of this land, receiving the rents and profits for more than 20 years, and that he is himself heir to John Connor, in whom the title became complete under the Statute of Limitations. Then, why should he not recover ? Has the defendant shown a better title ? That is the only question. We find her remaining in possession after the death of her husband who was seized in fee, and whose death occurred in 1846. She must be looked upon as tenant at sufferance to the right owner, her possession having commenced rightfully during her husband's life time. The case in 2 Nev. & P. 123, is in point.—4 U. C. R. 508.

But she sets up a title under a deed made to her by Kerr, the circumstances, of which are very suspicious, and make it look like a contrivance to cut out the heir. It was not shewn what right Kerr had to the premises, no title was deduced from the patentee of the crown, and the county register, it seems, affords no evidence of title in Kerr. Then, besides, he was not in possession when he made this conveyance to the defendant ; so that her claim is by deed from a person out of possession, and who was not shewn to have had any title. The deed, moreover, is a *mere release* or quit claim of all *Kerr's right* ; and, as a release, it can have no operation for want of a previous estate in the defendant for the release to operate upon.

The defendant is not shewn to have had any legal interest.

in the premises when she took the release—she held no term under Kerr, and no freehold interest from any one—but was a mere tenant at sufferance, having no interest that could be enlarged by a release; I refer to *Butler v. Duckmanton*, Cro. Jac. 169; Com. Dig., Release C. 2.

It was urged by the defendant's counsel, that as both parties claim under Kerr, his title must be taken to be undisputed; but there is no room for the application of that principle here, for John Connor's title rests in possession only as evidence of seisin: Kerr's previous possession is of no importance to strengthen his title, except in this sense, that being united to Connor's possession, it shews a dispossession of the patentee, and all claiming under him for more than 20 years, and thus proves that any adverse title had been extinguished.

But it is true, no doubt, that by parole evidence John Connor was shewn to have gone in about eighteen years before his death, upon privity with Kerr, as a purchaser from him; which tends to shew, that at that period, he acknowledged Kerr's title—not that he or his heir after him has acknowledged Kerr to continue seised.

The plain ground in the case, however, is that the defendant, for all that appears, was merely continuing the possession which she had held with her husband, and so was tenant at sufferance, and nothing more, when she took the release from Kerr—which release could, for that reason, convey nothing, even if Kerr had been shewn to have the legal estate.—Co. Litt, 266 (a).

We think the verdict for the defendant was clearly wrong and that there should be a new trial without costs.

Per Cur.—Rule absolute for new trial without costs.

DOE DEM. SIMPSON ET AL. V. MOLLOY ET AL.

A deed of bargain and sale made by a party out of possession, while another person is in actual possession claiming the fee—is void both at Common Law and under the Statute 32 Henry VIII, ch. 9.

A party in possession as tenant will not be allowed to purchase from a stranger, over his landlord's head.

Where upon two separate demises laid in a declaration, a verdict passes for

the plaintiff on one, and for the defendant on the other, the court will not, upon the application of the defendant, strike out the demise to the successful plaintiff, on the ground of want of authority for suing in his name, except in very clear cases.

Ejectment for lot 50, west side of Yonge-street, Township of Vaughan, except the north-west fifty acres, and one acre on the north-east corner of the lot.

It was proved on the trial of this cause that William Flanagan was the grantee of the crown for lot number fifty, on the west side of Yonge-street, in the Township of Vaughan.

He died, having devised 50 acres of the lot to his wife, and 100 to his son John; and upon the evidence given at the trial, it was satisfactorily made out that Mary Lucas had a good title to 20 acres of this lot 50, under the will of her father, John Flanagan, so that it was conceded that a verdict must pass for the plaintiffs, upon the demise, by Lucas and his wife.

The evidence had no foundation for a claim to any other part of the lot 50, except $16\frac{1}{2}$ acres which John Flanagan had demised to his son Thomas, and which the lessor of the plaintiff, Simpson, claimed under a conveyance from Thomas Flanagan.

There appeared no reason to doubt that at the time of this conveyance, Thomas Flanagan was the true owner; but he never had entered as devisee, nor been in any manner possessed, nor in the receipt of the rents and profits: and, on the other hand, it was shewn that one Captain Stewart having in some manner acquired possession of a large portion of the lot 50, to which, it appeared, he claimed title, including the $16\frac{1}{2}$ acres in question, Simpson, the lessor of the plaintiff, came in under him as tenant, in May, 1844, on an agreement to cultivate the land on shares, and while he was so possessed, on the 28th Dec., 1844, he, Simpson, took a conveyance of the fee for an alleged consideration of 125*l*. from Thomas Flanagan, who was not shewn to have been ever otherwise in possession himself, than when he entered, as it seems he did, to deliver formal possession to Simpson under this deed.

A verdict was taken for the plaintiff upon the demise of Simpson, subject to exceptions raised at the trial.

Phillpotts, obtained a rule to enter a verdict for the plaintiff on leave reserved as regarded the demise by Simpson—and also another rule to strike out the demise of Lucas and wife from the record, and stay all proceedings in the verdict given on that demise. The cases cited were—4 U. C. R. 152; 2 Ch. Rep. 170; *Adams on Ejectment*, 20; 3 Taunt. 440.

ROBINSON, C. J., delivered the judgment of the court.

The first question is, whether Simpson can be allowed to make title under the conveyance which he took from Thomas Flanagan; and it admits of no doubt that he can not.

At the time Thomas Flanagan made that deed, another person was in actual possession claiming the fee, and the bargain and sale made by him under those circumstances, could not pass the estate. It was void both at the common law and under the statute 32 Henry VIII. ch. 9.—Co. Lit. 265 (a) note 1; 4 U. C. Rep. 151

And besides he could not be permitted, while in possession as tenant, to purchase from a stranger over his landlord's head.

With respect to the *rule nisi*, for striking out the demise to Lucas and wife, the application is founded on affidavits, which if nothing were shewn against them, would appear fully to support us in taking that course; but the affidavits made by the plaintiff's attorney, and cited by Mr. Burns, disable us from granting the application, for they state expressly that Lucas mentioned and authorized the proceeding in the name of himself and his wife; and it could be only in a perfectly clear case that we could make such a rule upon the application of the defendant. This rule, therefore, must be discharged, and the verdict given for the plaintiff, for that portion of the land which is claimed upon the demise of Lucas and his wife will stand.—See 2 Ch. Rep. 170-1; *Adam's Ejectment*, 20; 3 Taunt. 440.

Per Cur.—The rule for entering a verdict for the defendants on the count on Simpson's demise, is made absolute.

DOE DEM. CROOKS V. CUMMINGS.

Cancellation of a will—what makes such an act complete—its effect when the draft of a new will is found with it unexecuted—The position of an heir when finding such papers—has he in any way, in the absence of fraud, to account for the cancellation of the old will?

Where A. meaning to make a new will, and having the draft with him for that purpose, has cancelled the first will—not by making obliterations and alterations in the body of it, but destroying the execution, as by tearing off his name and seal, and then dies suddenly before he has executed the other will. *Held per Cur.*—that A. under such circumstances dies intestate.

Held also, that the heir at law, finding such old will cancelled, and the draft with it, is not called upon in the absence of any imputation of fraud to account for the cancellation of the old will.

Quere—When the name and seal of a testator clearly appear to have been struck out of a will, should the *animus cancellandi* be still left as a question of fact for the jury.

This case brought again before the court, a question respecting the cancellation of a will made by the late Thomas Cummings, in 1808, which they had occasion to consider in 1842, after a former trial of this ejectment, in which the facts proved were substantially the same.

A verdict was found for the defendant.

Cameron, Q. C., obtained a rule to set aside the verdict, as being contrary to law and evidence, and for misdirection. Galt, shewed cause.

The cases cited were—1 P. Wm. 334; Burr. 2512; 3 Haggard, 181; 4 Russell, 435; 7 Simons, 569; 8 Vin. Abr. Devise K; 2 Bl. Rep. 1043; 1 Roll's Abr. 614; 3 Russell, 90; 4 Ea. R. 419; 11 M. & W. 901; 1 Collyer, 630; Eq. Ca. Abr. 407; Cow. 49; 1 Haggard's Reports; 2 Bro. & Bing. 662; 3 My. & K. 666; 5 Moore, 484; 6 Cruise, 97; 1 Robert's' Wills, 328; 7 Vez. 371, 372-3; 10 Jurist, 280; 5 Hare, 39; Powell on Devises, 295, note.

The facts in detail, and the argument of counsel, fully appear in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

As the case is an interesting and important one, affecting a right to real property of large value, I will recur to what has taken place for settling this rather difficult controversy.

In 1825 or 1826, I think, an action was brought between the same parties for trying the question, whether the will of 1808 must not be treated as still subsisting; and upon the trial of that ejectment, the jury returned a verdict in

favour of the same defendant, who claims as only son and heir of the testator, thereby expressing the opinion that the will had been revoked.

In 1841 the present action was instituted ; it was tried at Niagara, where the first action had been tried ; and resulted in a verdict for the defendant.

A new trial was applied for, which this court granted, chiefly in order that the jury might be asked to find expressly upon the intention with which the testator obliterated his name and seal ; for the former jury had come to the conclusion that it was done by the testator. The statement of the case, which I made for the purpose of disposing of that rule, will answer equally on the present occasion.

“Ejectment for lands in the township of Willoughby.

“On the 9th November, 1808, Thomas Cummings made his will, dully executed, by which he directed that his wife should be comfortably maintained out of his estate, and that his debts and funeral expenses should be first paid and discharged, and then, after some specific devises of land, he continues, ‘Item, I give and bequeath to my only son, James, and to my only daughter, Jane, all the residue of my estate, both real and personal, to be equally and proportionally divided between them two, share and share alike, to be by them and their heirs and assigns separately and distinctly possessed and enjoyed forever.’ He also appointed his son (James Cummings) and James Crooks (husband of his daughter Jane), with three others, his executors.

“This will was regularly attested by three witnesses, and was written on two sides of a sheet of paper, being subscribed with the testator’s name at the foot of the first page, as well as at the bottom of the will.

“The testator died in March, 1823.

“Before his death, he had given instructions to an attorney to prepare another will for him, and a fair draft of a will was made upon those instructions. This intended will directed that his debts should be paid, making them in the first place a charge on his personal estate, and, in case of

that proving insufficient, then on his real estate, thereafter devised in fee.

"He then devised, as follows: 'Secondly, I devise all my freehold estate, now my present homestead, situate upon the Chippewa, and lying upon Lyon's Creek, containing seven hundred and sixty-four acres of land, together with the appurtenances, &c., unto my son James Cummings, of Chippewa, merchant, and to my daughter Jane, wife of James Crooks, of, &c., for and during the term of their natural lives, to have and to hold the same as tenants in common, and not as joint-tenants; and in case of the death of either the said James Cummings and Jane Crooks, then to the heirs male of such one of them first dying, in tenancy in common with the survivors, and to the said survivor's heirs male, in tenancy in common with the male issue of the one first deceased, such heirs male being of the respective bodies, lawfully born or to be begotten, of James Cummings, my son, and Jane Crooks, my daughter, by James Crooks, her present husband, without impeachment of waste. And in default of such issue male in either, then to the right heirs of the person last seised in tenancy common with the male issue then in being, as an estate of inheritance in fee simple forever. And in default of such male issue of the said James Cummings and the said Jane Crooks, then to the proper heirs of such person last seised in tail, his heirs and assigns forever, as tenants in common; remainder to my own right heirs forever.

"Thirdly, I will and devise, unto my said son James Cummings, and my said daughter Jane, wife of James Crooks aforesaid and to their heirs and assigns forever, as tenants in common, all the residue of my real and personal estate, and to their only use and behoof forever, subject to debts, if the personal assets should be insufficient.'

"In this draft, his son, James Cummings, and his son-in-law, James Crooks, are made executors (no others being joined with them).

"This draft was apparently a fair copy, intended to be executed—no seal had been put to it. The date was left

blank, as to the day and month, but the year, 1820, was written at length.

"It was found among the papers of the deceased, after his death; and the deceased also left among his papers, tied up in the same envelope with the draft, the will which he had executed on the 9th Nov., 1808, with his name obliterated, by a pen being drawn across the name at the foot of the will and across the seal, as if to cancel it; the pen was in like manner drawn through the names of the subscribing witnesses, but the testator's signature at the foot of the first page was not obliterated.

"The question is, whether under these facts Thomas Cummings died intestate, or whether the will made by him made in 1808 still subsists uncanceled."

I have a minute of what was said by me, in giving judgment, when we awarded a new trial which I will also read, as it will serve to shew the manner in which it impressed us; for I have no recollection that either of my brothers took a different view.

"I understand that the case comes before us, upon the finding of the jury, that the cancelling or obliteration which appears on the will was done by the testator himself. Unless that is understood, or at least that it was done by his direction, and was not the act of a stranger, we are not in a situation to dispose of the case, and there must be another trial to settle that fact.

"But supposing this to stand admitted, an examination of the various cases bearing upon this question shews, that in some cases it is not enough to shew the bare fact of cancellation; but it may be, under the circumstances a question for the jury, whether the cancelling was done by the testator, with the intention of revoking, that is, of revoking absolutely and at once, or whether it was not done with the intention of substituting another will for the first one, so that the deceased person did not mean to die intestate, but to revoke the former disposition in favour of another intended to be made, and perhaps supposed to have been made, and to revoke it only on the condition of the other taking effect.

"If the jury in this case are to be taken to have expressed

their judgment on this point, then there can remain only the legal question upon the consequence of the act that was done, coupled with the intention which accompanied it. If there is any question behind as to the *animus revocandi*, that question must yet be submitted to the jury, and cannot be answered by the court. Upon the supposition that the jury have considered the testator to have struck his signature from this will, and not for the purpose of cancelling it, otherwise than as part of the intention to make the change in the disposition of his estate, which was proposed by the draft of the intended new will, then we may consider what would be the legal effect of such an act, done for such a purpose, or under such circumstances.

“If the testator had executed the second will, but insufficient, so that it could not take effect as a devise, and imagining that he had made a valid will, had thus cancelled the former, then I think it clear that such cancellation would not be a revocation of the former will, from the evidence that would be afforded of the intention not to die intestate, and not to revoke the first will except for the purpose of setting up the second. All would be regarded as one act and incomplete; and the intention to revoke would be looked upon as not having been fulfilled—wherefore the first will should stand.

“If the testator had cancelled the first will before executing the second, and the latter had been imperfectly executed, I think the decision must have been the same.

“But the case before us differs in this, that the testator has not proceeded so far as to execute a second will, though he gave clear proof that he had at one time an intention to make one, and has enabled us to judge of its nature. We must therefore admit, that before we could possibly suppose he had made another will he cancelled this will made in 1808, so far as the act described amounted to cancelling.

“Is it, then, more reasonable to hold, that he intended at all events to die intestate rather than his first will should take effect, or that he intended not to die intestate, but merely to substitute another disposition for the one he had made, and to cancel the former when he had made the

other, thought he had imprudently begun by cancelling the first one before he had executed the other?

"Can we in this case, as in the case of a badly executed will, regard the whole as designed to be one act, and therefore treat the intention as having been in no degree fulfilled until the whole act has been completed? I can see that arguments can be advanced against such a position, but I cannot satisfy myself that there is anything strong enough in the difference between the two cases to prevent the principle extending to both; and it is my opinion that as the testator clearly intended to make a second will in part agreeing with the former, and especially as to the property, still leaving it to his son and daughter, though in somewhat different manner as to the limitations, but not to the son alone to the exclusion of the other, and as we have no evidence of any change of that intention, the circumstance of the testator's dying before he had executed the second will should be looked upon as an accident preventing his fulfilling his intention upon which the revocation of the first will was dependant, and that the first will should therefore be regarded as not revoked. If Mr. Cummings had been proved to have thus cancelled his first will a moment before he was proceeding to put his name to the second, and he had been arrested in the act of doing the latter by a sudden and fatal illness, then, I think, there could be no difficulty in considering that an absolute revocation was not intended, and had not been effected. It remains then only to consider what construction should be put upon the fact of the draft of the second lying with him for some time unexecuted, without our knowing the cause; the will of 1808 being also preserved by him, and not destroyed or thrown away, though cancelled or obliterated, but at what time we know not. The inference by intention to revoke must, I think, in such a case be drawn by the jury, and cannot be drawn as a legal inference by the court. I am, therefore, of opinion that we should grant a new trial, in order that it may be expressly submitted to the jury, whether they do not find from the evidence that the testator obliterated the signature to his will with the

intent of cancelling and revoking it absolutely, and at all events; or whether he did the act only as in part execution of an intention to execute the new will which he intended to substitute for it.

“ *Per Cur.*—Rule absolute for new trial.

Upon the second trial of this cause, which took place at the last assizes, the evidence given upon the former trial by Robert Dickson, Esq., the professional gentleman who prepared the draft of a will in 1820, under the instructions of the late Thomas Cummings, Esq., and by Dr. Lafferty, the witness to this will, made in 1808, was read by consent—both of these gentlemen have since died. It was proved, also, that the late Thomas Cummings died at the residence of his son, the defendant, in whose family he had been for some time living; his wife having died before him.

It was not shewn that anything had occurred to interrupt the kind feeling which had existed between him and his daughter; on the contrary, it would seem from a number of letters which had passed between him and Mr. Crooks, and which were allowed to be read at trial, that he continued to maintain that cordial and affectionate intercourse with his daughter and her husband, which might be expected to arise from the relation.

It was proved, further, that Mr. Cummings died suddenly in March, 1823; that he went to bed in good health, and was found dead the following morning.

It was contended, on this last trial, that the will of Mr. Cummings, having been produced by his son, the defendant, in a mutilated state, the signature, and seal, and names of the witnesses being obliterated by marks drawn across them, the onus of proof was thrown upon the defendant to shew how that occurred; and that he must satisfy the jury that it really was done by the testator before any intention to revoke can be inferred from the act.

Th learned judge told the jury that they were to determine whether the testator himself, or any person in his presence, and with his assent, made the obliteration with the intention of revoking the will; that he did not think

that the defendant, having produced the will from his father's papers left in the defendant's house at his death, afforded ground for the conclusion that he had himself obliterated the will, or procured it to be done, and that he did not think it was incumbent on the defendant to shew how the obliteration was made, or that when he found the will it was in that state; that his producing both the cancelled will, and the draft of an intended will, led to the conclusion that the papers were found by him in that state; since, if he were capable of fraudulently suppressing his father's will, he could as easily have burnt, or otherwise destroyed the old will, as to obliterate it and leave the writing in existence. He further instructed the jury, that if the testator had cancelled his will, with the intention that it should thereby be wholly destroyed, the cancellation would be complete, although he might have intended to execute another will; and that, in that case, the lessor of the plaintiff could not recover; but that if the will was cancelled or obliterated, intending that such obliteration should take effect only at the execution of another will: then the verdict should be for the plaintiff. It was observed that there was not evidence when the will was obliterated, or by whom, or from what motive; and that the draft of a new will, which was ready to be executed, and had been prepared on the testator's instructions, appeared to have been in his possession from 1820 to the time of his death, in March, 1823, unexecuted. It was left to the jury to say, whether the testator had cancelled his will; whether he did it with intent to revoke and set it wholly aside; and whether he intended to die intestate.

The jury found a verdict for the defendant, and gave it as their opinion, from the evidence, that the will was cancelled by the testator, and that it was so cancelled with intent to die intestate.

We cannot, I think, on any good ground set aside the verdict. If the jury, instead of taking that view of the facts and of the motives and intent of the testator, which was most adverse to the claim of the devisee under the will, had come to the contrary conclusion, and found

that there was no revocation, because there had not been the *animus revocandi* accompanying the fact of cancelling—I must say, I feel that there would have been difficulty in supporting that conclusion.

It might have been the view most consistent with justice; and I had brought myself, when we granted the new trial, though evidently not without hesitation and doubt, to think that a verdict given in accordance with it, could be properly maintained. I doubt that more, the more I have considered the matter since; but of this, there can be no question, we cannot insist on the jury taking that view of the case, as being the only one consistent with the evidence, and with legal principals, or as being the view most in accordance with them. On the contrary, though the case seems hard as respects the lessors of the plaintiff, and may in truth be so, yet I incline to think that the will of 1808 cannot be set up again as an existing will, without straining the law more than we should be warranted in doing.

The manner of obliterating seems quite unequivocal; the testator's name, subscribed opposite to his seal at the foot of his will, was scored along its whole length with ink, in a manner not to be mistaken, clearly not from accident, but from a desire to efface and cancel the signature. Then the seal had lines drawn across it in several directions, shewing as clearly that the intention of the person who did it was to cancel the seal, and across the names of the three subscribing witnesses several lines were drawn, as plainly marking as could be done that the attestation of the will, as well as the execution, was to be thereby cancelled and annulled.

The first important question to be asked was, who did this? It was natural for the counsel for the plaintiffs to call the attention of the court and jury to the fact, that as the effect of destroying the will was to have the defendant to inherit a large property as sole heir, to the exclusion of his sister, who was co-devisee in this will, it might be reasonably demanded of him to account (so far as circumstances could admit,) for the mutilation of the paper,

which having been in the testator's custody, was first seen after his death in the defendant's hands.

The jury heard all that was urged on that point; and heard, also, what was remarked with regard to the appearance of the obliteration, as tending to show that all that was done with that view was not done at one time. It could not be pushed in reason further than it was pushed by the counsel and by the court; for after all it could not but be considered, that upon former trials, when admissions formed a good part of the evidence, it was assumed, without the intimation of a suspicion to the contrary, that Mr. James Cummings, the defendant, had immediately after his father's death, I think on the second or third day, found the will and the draft among his father's papers, tied up in the same wrapper, and that the will, when found, was precisely in the state we now see it. These are such admissions as could scarcely be retracted, without some evidence to show that the confidence formerly reposed in the defendant's statement, had been found to be reposed without good ground. It would be most painful, indeed, for the lessors of the plaintiff to desire to retract their former admissions on this point, and we did not understand that it was by the instructions of the plaintiffs that any doubt was suggested on the last trial, in respect to the paper being now in the same state as that in which the defendant found it, but that the attention of the court was rather called to it by the counsel as a legal question necessarily arising whether the defendant was not bound to account for the obliteration.

This point received, I think, the only consideration which it could receive at the trial. It was not out of the ordinary course for an only son, in whose house his father had died, to be the first to look into his papers; and though it would have been better, as the very possibility of such a discussion as this shews, if the defendant had taken the precaution not unusual, to have a witness present, when he examined his father's papers; yet we cannot hold that there was a legal necessity for it. Then as the defendant was the person into whose hands, and under whose view his father's papers

would most properly come in the first instance, if he did first see the two papers lying in a parcel, as he produced them, when no third person was present, then there was nothing in his power to prove—he could only do as he has done, that is, produce the papers; and we are not warranted in saying that he knows more than we do of the time when, or the person by whom the obliterations were made.

The law holds no one bound to do what is impossible; and we cannot, therefore, pronounce that the defendant is absolutely under the necessity of explaining and proving what he may know nothing of. Indeed, if the defendant had in a formal manner required a witness to be present when he opened his father's papers, that very precaution might, in some minds, have induced suspicion; and, after all, it could not be certainly known that he had not had access to the papers before the third party was called in.

Then we have here the case of a gentleman possessed of a valuable landed estate—now, I believe become very valuable—making his will in 1808; in which after two or three unimportant bequests, he leaves the bulk of his property, as he might naturally be expected to leave it, to his two children; Mrs. Crooks being his only daughter, and the defendant his only son.

In 1820, when both these children, being married and having families, were likely to survive him many years, and were in a situation in which we must suppose his bounty would be at least very acceptable to them, if not important and necessary, he conceives the intention of making a new will, leaving out some specific bequests, which the death of parties, or other changes, might have led him to omit, but still dividing the bulk of his valuable property equally between his son and daughter; the only object of changing his will, so far as they were concerned, seeming to be, that he desired to preserve the succession of his lands in his male descendants.

A will to carry these intentions into effect, is prepared for him and placed into his hands, ready for execution. He keeps it between two and three years, till he dies, but never executes it; and when he dies, the draft is found in a paper

with his executed will, and the latter in the state which I have described. Now the jury have found that it was he who obliterated or cancelled his name and seal, and the names of the witnesses to his former will. He may have done that immediately, or soon after giving instructions for a new will, or on receiving the draft; or he may have done it within a few hours of his sudden death, and with the intention present in his mind, of executing the other will without delay, and may have been prevented from doing this, by his death occurring as it did, without warning or time for preparation; or he may have cancelled the will at anytime between these two periods. No one can tell what the fact really was. The jury must, as in other such cases, form their conclusions as well as they can—for some conclusion must be come to; and whatever they find to have been the fact, we have no good ground for over-ruling, for we know no more of the facts than they do; and are not to judge of them, over-ruling their decision, upon mere conjecture.

Then, is there any case to be found where a testator, meaning to make a new will, differing much or little from one he has already executed, has cancelled the first will, not merely making obliterations and alterations in the body of it, but destroying the execution, as by tearing off his name and seal, and dying before he had executed another will, or made any attempt at doing so? I have found no such case.

I have no doubt it was a question for the jury, whether the blots and scores across the signatures and seal, were made by the testator for the purpose of cancelling; but I think, also, that the inference was so plain, upon the face of the instrument, that they were made for that purpose, that the jury could not be expected to come to any other conclusion. That being so, the *animus revocandi* was thereby as clearly shewn, as if the testator had thrown the will in the fire.

And did he not, by that unequivocal act, shew his resolution to be, that the will of 1808 should no longer exist? He knew well enough that he had made no other when he

destroyed that; and though he may have intended not to die intestate, how did his situation differ from that of any man who had never made a will, but always meant to do so, and yet died without carrying his intention into effect? Few people possessed of property really mean to die intestate, though many do, to the great disappointment and inconvenience of their connections; and it avails nothing in such cases, that they have indicated a resolution to make a will, or that they had one prepared for their signature, unless they have gone so far as to execute it.

Mr. Cummings' situation differed only in this: that he had once made a will, which, however, he destroyed, and as it would appear, deliberately.

This case is quite different from those which have arisen, where a testator can be taken to have believed that he had made another valid will, which, however, turned out to be in fact invalid, from defective execution, or otherwise, or to be inoperative from its internal defects.

The case of Winsor v. Pratt, 2 Brod. & Bing. 650, though it may seem at first a very strong authority in favour of the plaintiffs, is plainly distinguishable; because there, the first will was not cancelled as this is, by destroying the signatures, which act shews an intention that it shall no longer have effect to any extent, or for any purpose—but obliterations and alterations had been made only in the body of the will.

The question, I think, in the case before us is, whether it was not going rather too great a length in favour of the plaintiffs, to leave it to the jury as a question for them to determine, whether the testator had struck out his name and seal, *animo cancellandi*, for the act would seem incapable of any other construction.

The testator seems to have resolved to run the risk of dying intestate, before he completed another will, rather than of dying, and leaving this will to operate; and yet, if we can suppose the same frame of mind to continue in which he was when he gave instructions for his new will, we should find it almost impossible to believe that he would

prefer leaving no will, rather than the first one from which the second differed so little in substance.

We cannot tell, however, but that the testator may have been restrained from executing the second will by a consideration of circumstances arising in the interval, which may have made him feel that he was not fairly at liberty to deprive his son of half of his inheritance. It was indeed intimated that his son had had debts to settle for him, though there was no clear evidence of that fact.

The tendency of some of the cases is such as may seem to make it, even under the circumstances of this case, a question for the jury, whether the testator did not cancel his will *sub modo*, and provisionally only; that is, on the condition of his executing another will, which he had caused to be prepared.

After the first trial, I came though with difficulty into that view; so far that I desired to have the opinion of the jury, at least taken upon his intention. The present verdict settles that point, and against the plaintiffs.

It appears to me, that it cannot be said here, as in some of the cases it is said, that the cancelling was all one act with the exception of another paper, intended to be a will, which should take the place of the first; and that until all was done, it must be regarded as if nothing was done. For here the testator, meaning to make a second will, very like the first, begins by cancelling or destroying the first, but never proceeds to execute another, nor ever, so far as we can see, attempted to do it; and dies without its being possible that he could believe he had executed any other will,

I find no adjudged case strong enough to restore the first will again, under such circumstances. I refer to 1 Rolls. Abridg. 614; Anst. 81; Burtenshaw v. Gilbert, 1 Cowper, 49; and to Onyons v. Tyrer, 1 P. W. 345, between which and the present case there is a substantial difference, which is very obvious.

The case of Limbery v. Mason, 2 Comyn's Rep. 451, is an authority, I think, in favour of the defendant; but the case most resembling this is one referred to in Rolls. Abr. 614, as decided in 14 Eliz., where a man devised lands by will,

and afterwards revoked it by parol, in the presence of certain persons, requiring them to take notice of his present revocation, saying, moreover, that he would alter it when he came to D. (a market town), and before he got to D. he was murdered, the will was held to be revoked, though the revocation was not in writing. That was before the Statute of Frauds; and the declaration of his intention before witnesses, was held to be one way by which a testator could legally revoke his will; and the principle established in that case is, that having effectually annulled his first will, though with the avowed intention of making another immediately, the will cannot be set up again, though the testator was prevented by accident from making a new one.—*Vin. Abr. Devise P.*; *Cro. Eliz.* 306; *Cro. Jac.* 597; 2 *Salk.* 592; 2 *Vern.* 741; 10 *Mod.* 741; *Gil. Rep.* 130.

I have gone more into this case than may have seemed necessary, because it has the appearance of being a hard one against the testator's daughter; the property is said to be valuable, and the contest is between relations; but I must say, that looking at the evidence, I feel no doubt that the express finding of the jury, on the two points on which the case must turn, should be taken by us as conclusive.

Per Cur.—Rule discharged.

THOMPSON V. MONTREAL INSURANCE COMPANY.

Partial insurance against fire—what amount assured entitled to receive under. The kind of injury to property, other than by fire, assured, entitled to recover for.

Where a person insures upon his house or goods for a *part* only of their value, and suffers a loss equal to the full amount assured, that sum (unless the policy is otherwise *specially* framed) must be paid by the insurers, and not merely such a proportion of that sum as would correspond with the proportion between the sum insured and the whole value of the property on which the insurance was effected. The condition in the policy, that "in case of the removal of property to escape conflagration, the company will contribute ratably with the assured, and other companies interested, to the loss and expenses attending such act of salvage," is not a condition which will have the effect of changing in this respect the law of partial insurance.

Semble, that in the form adopted in ordinary policies, injuries to goods by wet, or in any manner from the exposure during the confusion of the fire, before they can be got to a place of safety, and goods lost or stolen in the confusion arising from the fire, and of the destruction, injury, or loss of which, the fire can be said to be the proximate cause, are within the terms of the policy; but in suing for such loss, the plaintiff must describe the occasion and manner of loss, according to the fact.

Declaration on a policy of insurance against fire. 1st count omitted, as not bearing on the question determined.

2nd count in the usual form, shewing an indemnity against loss, &c., covered by policy, *not exceeding 1000l.*, and setting out conditions 11 and 12 of the policy, which, so far as they related to the main point decided in the case, were as follows :

Condition 11. "Where property insured is only partially damaged, no abandonment of the same will be allowed, unless by consent of the company. In case of the removal of property to escape conflagration, the company will contribute ratably with the assured, and other companies interested, to the loss and expenses attending such act of salvage. But the company will not hold themselves liable for any loss or damage upon goods, removed from any building not actually on fire contrary to the declared desire of any officer or agent of the company, or not being ordered or sanctioned by such officer or agent, when personally present, and in a situation to be consulted by the assured."

Condition 12. "If any difference shall arise with respect to the amount of any claim for loss or damage by fire, and no fraud suspected, such difference shall be submitted to arbitrators mutually chosen, whose award, or that of their umpire, shall be conclusive. The arbitrators or valuers shall fix the value immediately before and after the fire, and the company shall pay or make good the difference between the two sums, either by reinstatement, repairs, or by payment in cash, at their own option."

Plea. And for a plea to the second count of the declaration, the defendant say, that the goods, ready-made clothing and shoes, in said count mentioned, were not, nor were any of them or any part thereof, burnt, consumed, or destroyed by fire, in manner as by the plaintiff in that count alleged; and of this the defendants put themselves upon the country, &c.

Upon issue being joined, it was ordered that the following facts should be submitted to the court, as a special case.

Special case. The plaintiff, on the 30th day of December, in the year of our Lord 1847, received from Mr.

Beekman, the authorised agent of the company in Toronto, an agreement or receipt to the effect set out in the first count of the declaration; and before any ratification of the agreement by the directors, or delivery of the policy to the plaintiff, the fire in question took place, by which the plaintiff suffered loss as hereinafter mentioned; the policy, in the form set out in the second count, being delivered about three weeks after the fire, although antedated to the time when the risk with the company commenced. The agreement was given, subject to the conditions of policy. The policy was in the usual printed form long used by the defendants; and several other companies doing business in Upper and Lower Canada, issue policies with similar conditions. Immediately after the fire a question was raised by Mr. Beekman, as to the manner in which the payment for loss should be made, as the damages had been sustained principally by the removal of the goods from the plaintiff's shop, the fire having originated in a building next to him. As the parties could not agree, the question as to the amount of damage to the plaintiff's stock generally was submitted to arbitration, Mr. John G. Bowes being the arbitrator named by the plaintiff, and Mr. Henry Stewart by the defendants, by whom the following award was made.

"We, the undersigned, appointed by Robt. Beekman, Esq. Agent for the Montreal Assurance Company, and Thomas Thompson, Esquire, proprietor of the Mammoth House, to assess the damage done by fire, on the morning of the 7th instant, to the stock in the above establishment, have, after carefully examining the same, and separating it into lots as set forth herein, agreed to the following award, viz.:

"Goods tossed by removing, but not otherwise injured.....	£1407	13	1				
Goods damaged 6 per cent.....	839	7	10	£50	7	3	
Leather.....	181	18	1				
Goods damaged $7\frac{1}{2}$ per cent.....	375	10	6	28	3	3	
" " 15 "	570	16	8	85	12	6	
" " $33\frac{1}{2}$ "	475	5	6	158	8	6	
	£3850	11	9	£322	11	6	
Amount of invoices since commencement of business.....	5544	12	1				
Amount sold, less 25 per cent.....	£1618	17	2				
Stock in hand, per inventory.....	3850	11	9	5469	8	11	75 3 2
							£397 14 8

"397*l.* 14*s.* 8*d.* provincial currency. We further award the sum of 10*l.* as the expenses of this arbitration, to be borne equally by the above named Robert Beekman, Esquire, and Thomas Thompson, Esquire.

(Signed)

"JOHN G. BOWES,

"HENRY STEWART.

"Toronto, 13th March, 1848."

As further explanatory of the facts connected with the loss, the plaintiff has made the following statement, to be taken as part of the case:

Amount of goods removed on which nothing has been allowed.....	£1407	13	1			
Leather not removed.....	181	18	1			
	£1589	11	2			
Amount on which 6 per cent. allowed.....	839	7	10	£50	7	3
Am't damaged by water, not removed, $7\frac{1}{2}$ percent	375	10	6	28	3	3
" " " " 15 "	570	16	9	85	12	6
" " " " $33\frac{1}{2}$ "	479	5	6	158	8	6
Assessed amount damaged on premises.....	£272	4	3			
Burned, as I suppose, however this is only conjecture.....	£30	0	0			
Lost, &c.....	45	3	2	£75	3	2

(Signed)

THOMAS THOMPSON.

After notice of the appraisement, and before action brought, defendant paid plaintiffs the sum of 101*l.* 6*s.* 6*d.*, contending that the same was all they are liable for, as a ratable proportion of the loss under the policy; that as the plaintiff's stock, in all, was worth 3925*l.* 15*s.* 11*d.*, that sum exhibits a loss by appraisement of 397*l.* 14*s.* 8*d.*, the sum insured, viz., 1000*l.*, will ratably shew 101*l.* 6*s.* 6*d.*, as the defendants' ratable contribution to the loss with the assured. This sum the plaintiff received without prejudice, contending that the defendants are concluded, first by the agreement before the policy issued, secondly by the award, and thirdly by the legal construction of the policy.

The question for the consideration of the court was, whether on the case stated the plaintiff is entitled to recover from the defendants the full amount of damage; or whether the defendants are discharged by the ratable payment; or whether, at any rate, the defendants are only liable for a ratable contribution as to goods damaged, lost or stolen, in removal.

Nothing more was known of the manner of circumstances of the loss than is stated above; and the court were to be at liberty to draw any inferences from the facts stated, that a jury might draw. If the judgment of the court be in favor of the plaintiff, then judgment as by confession was to be entered for such sum as the court should direct. If in favor of the defendant, then judgment of nonsuit to be entered.

Cameron, Q. C., for the plaintiff. *Hagarty* for the defendants. The cases cited on the arguments were—*Levy v. Baillie*, 7 Bing. 349; *Hammond on Insurance*, 99; *Ellis on Insurance*; *Park on Insurance*; *Austin v. Drewe*, 6 Taunt. 436; *Lawrence v. Aberdein*, 5 B. & Al. 107; *Peake*, 212; *Buck v. Royal Exchange Insurance Company*, 2 B. & Al. 73; *Redman v. Wilson*, 14 M. & W. 483; *Beaumont on Insurance*, 6, 43, 61.

ROBINSON, C. J., delivered the judgment of the court.

It appears to us, that the award which has been made in this case leaves but little to be decided between the parties.

The plaintiff has sued for a total loss, as he may, and yet recover for a partial loss on the evidence.

He alleges that the goods were burnt, consumed and destroyed by fire, which the defendants deny. Upon that issue, the plaintiff can in strictness recover for such goods only as he shews to have been destroyed or injured by fire, or for such as the jury, in the absence of any other account given of the loss, may fairly presume to have been destroyed by fire. He can recover for none on these pleadings, that are certainly shewn to have been destroyed in some other way, and not by fire.

The parties may not intend that this diversity between the proofs and the allegations shall give rise to any difficulty, but it is proper that we should notice it, to prevent this from becoming an embarrassing precedent hereafter.

Then, not dwelling further on that point, we are next to consider that, according to the 12th article in the policy, the amount of the claim for loss has been submitted to arbitration, and the arbitrators have made an award that the amount of loss was 397*l.* 14*s.* 8*d.* currency.

It is shown to us in the case that they have allowed, of

this sum for goods partially damaged 322*l.* 11*s.* 6*d.*, and for goods deficient, 75*l.* 3*s.* 2*d.* = 327*l.* 14*s.* 8*d.*

The award does not shew by what kind of injury the partial damage was found to have been occasioned, that is, whether by rough usage in removal, by wet, or by fire; and it does shew that what has been allowed for deficiency is a sum ascertained by deducting the amount of sales from the amount of all the invoices, first taking from the amount of sales 25 per cent., as having been the plaintiff's advance or profits upon the invoices paid. This computation shewed 75*l.* 3*s.* 2*d.* worth of goods unaccounted for.

Whether goods to that amount were really burnt, or stolen, or lost, the award does not inform us. If any of the goods were burnt the arbitrators may have assumed that the portion found wanting, and not otherwise accounted for, was burnt.

I see nothing allowed in the award, which, for anything stated in the award, or in the plaintiff's explanation of the items forming part of the case, we can say the arbitrators could not properly allow as for a loss, legally covered by the policy.

Injuries to goods by wet, or in any manner from the exposure during the confusion, &c., before they could be got to a place of safety, and goods lost or stolen in the confusion occasioned by the fire. are in our opinion within the terms of the policy; but in suing for such loss, the plaintiff should describe the occasion and manner of loss, according to the fact.

The award is not relied upon in pleading; but on the terms on which the case is submitted to us, we should, in my opinion, put ourselves in place of the jury, adopt it as an adjustment of the loss agreed to by both parties, so far as regards the amount of loss occasioned to the plaintiff by the fire and within the risks insured against; and when we find, besides this, that the defendants have acted upon the award, and actually paid a rate on the whole sum awarded by it and based upon it, there is nothing left open for them to contend about, except the main point, whether the defendants are to pay the whole 397*l.* 14*s.* 8*d.*, or only

101*l.* 6*s.* 6*d.*, which they contend is all they are bound to pay, as bearing the same proportion, compared with the whole amount of damage, which the sum insured, 1000*l.*, bears to the stock on hand at the time of the fire, 3925*l.* 14*s.*

All that can be fairly looked upon as reserved for our opinion is, whether the defendants are to pay the full damage, which they have admitted to have been fairly ascertained, by paying a rate upon it, or whether they stand acquitted by paying that rate.

This point is, in our opinion, quite clear in favour of the assured. This policy entitles him to be made good whatever loss (not exceeding 1000*l.*) he has suffered from causes of damage within the policy; and we do not see that there is any exception in the policy which applies to any description of loss shewn to have been suffered in this case.

It is every day's practice, that a person insures upon his house or goods for a part only of the value, being willing, as regards the remainder, to take the risk of loss upon himself; and it is equally within daily experience, that in such cases where a loss has been suffered equal to the full amount insured, that sum is paid, and not merely such proportion of that sum as would correspond with the proportion between the sum insured and the whole value of the property on which the assurance was effected.

Partial insurances are very common, and it would be a strange rule which, in case of loss, would make good to the party assured only a small portion of the sum on which he has been paying a premium; although, having insured only in the one office and for the one sum, he has no ground for claiming indemnity from any one else.

We have looked carefully over the treatises on insurance, to which reference was made in the argument, and we see nothing in any of them to give countenance to what the defendants have, not very confidently, I think, contended for.

No doubt, all arrangements for insurance are conventional. The parties may enter into such contracts as may create exceptions to the general rule, and whatever they agree to they must abide by.

There is mention made in one case of such a stipulation

having been inserted in policies, under particular circumstances, in order to limit the indemnity in case of loss, according to the principle spoken of ; but it is obscurely stated upon what consideration such terms have been introduced ; and at any rate, when a policy is so framed, it is a deviation from the common form, and changes what would otherwise be the effect of a partial insurance.

The condition in this policy, that in case of the removal of property to escape conflagration, the company will contribute ratably with the assured and other companies interested, to the loss and expenses attending such act of salvage," has no reference to anything but the mere expenses of saving what has escaped destruction, and cannot be distorted into a stipulation, that the assured must go without indemnity for any part of the destruction which his property has suffered, and which his insurance covers.

We see no ground on which the plaintiff's right can be denied to recover for the 397*l.* 14*s.* 8*d.* awarded. In every case of this kind, whether the loss be total or partial, the first question will be, whether the fire can be said truly to have been the proximate cause of the destruction, injury, or loss of goods complained of. If it were so, then such destruction, injury, or loss of goods, is covered by the policy, and the assured has a legal claim to be indemnified to the amount of his insurance, if that be necessary, for making good his loss ; and I cannot conceive on what principle it can be contended that under a policy framed as this is, he can be prevented from recovering such indemnity.

The clause referred to, binding the company to contribute ratably with the assured and other companies interested, in the loss and expenses attending any act of salvage, can have no such effect. That was surely not intended to deprive the assured of any portion of his claim under the general terms of his policy, but is a condition wholly for his advantage, and intended to afford him a remedy for something in addition to the compensation for his goods destroyed, injured, or lost, in consequence of the fire.

The object of it no doubt is, to encourage the assured to make every exertion to save his goods, by holding out to him the advantage of being proportionably reimbursed in

the expenses which he may incur. Thus, if the assured here had had 5,000*l.* worth of goods in his shop at the time of the fire, and had succeeded in removing the whole without injury; then if besides this policy for 1,000*l.*, he had insured 2,000*l.* in other offices, and had taken the risk of the remaining 2,000 upon himself, he would have had a claim on the defendants to one-fifth of the expenses he had been put to, and for two-fifths on the other insurers. But we consider that it cannot be the effect of the clause in question, to make the assured bear without indemnity, any portion of the value of goods actually lost, destroyed, or injured by the fire, and lost in such a manner as would make the loss come within the policy, unless, indeed, where the loss happens to exceed the sum insured.

Per Cur.—Judgment to be entered for the plaintiff.

DAVIS V. DUNN AND PARKE.

What put in issue by the plea of, did not indorse in manner, &c.—An indorsement of a note, when over due, no excuse for non-presentment to maker—Nonsuit of plaintiff, upon insufficient grounds, must be set aside, though declaration bad.

A., the indorser of a note, sued B. the indorsee, and alleged in his declaration that, *after* the note became due, to wit, &c., B. indorsed to A. There was no averment of presentment to the maker, or of notice of non-payment. B. pleaded that he did not indorse the note in manner and form as the plaintiff alleged. *Held, per Cur.*, that under this plea the fact of indorsement (and not the time) was all that was put in issue.

Held also, that the note being endorsed to the plaintiff when *over due*, was no excuse for non-presentment to the maker, and that therefore the declaration was bad in not shewing a sufficient cause of action.

Held also, that though the declaration was *substantially* defective, yet as the plaintiff had been non-suited upon the *insufficient* ground of not proving the time, as well as the fact of indorsement, the nonsuit must be set aside, (The court, however, in such a case, may grant a new trial without costs, and then allow the plaintiff to amend.)

Appeal from the District Court of the Talbot District.

The defendant Parke was sued as indorser of a promissory note, made by Dunn, payable to defendant, Parke, or bearer, one day after date. The declaration averred, that *afterwards, and after the said promissory note became due, viz., on, &c.,* the defendant indorsed the same.

There was no averment of presentment to the maker, or of notice of non-payment.

The defendant pleaded, that he did not indorse the said note in manner and form as the plaintiff alleged.

Upon the trial, the plaintiff merely gave evidence of the fact of indorsement, not of the time. And the defendant moved for a nonsuit, because it was not shewn that the indorsement was made after the note became due, as the declaration alleged.

The judge below reserved the point, and afterwards in term nonsuited the plaintiff.

The question upon appeal was, whether the nonsuit was proper.

Duggan for the appellant. *Crooks* for the respondent.

The cases cited were—*Walters v. Earl of Thanet*, 7 Dowl. 251; *Dehers v. Harriott*, 1 Shower, 164; *Brown v. Davies*, 3 T. R. 80; *Smith v. Beckett*, 13 E. R. 187; *Young v. Wright*, 1 Camp. 139.

ROBINSON, C. J., delivered the judgment of the court.

The judge of the District Court, reasoning upon principle, took a sensible view of the case, and held, that as the statement that the note was indorsed after maturity, was all that could relieve the plaintiff from the necessity of averring presentment and notice, it was a material averment which the plaintiff was bound to prove as an indispensable part of his case. But upon authority we must hold, that upon the plea, the fact of indorsement is all that is in issue, and not the time. *Young et al. v. Wright*, 1 Camp. 139, is a decision to that effect, and its authority is recognized by Mr. Justice Bayley and Mr. Chitty in their Treatises on Bills.—*Bayley on Bills*, 318; *Chitty on Bills*, 572; *Story on Pro. Notes*, 203.

The declaration, I apprehend, does not state a sufficient cause of action, omitting, as it does, all averment of presentment to the maker, or of excuse for not presenting, which would not be made unnecessary by the fact of this note being taken by the plaintiff when over due. It could not be duly presented certainly, if there had been an omission to present it at maturity; but still I assume that it would be necessary to present it before the indorser could be charged, as his undertaking is only conditional, that he will pay if the maker does not.

We have therefore considered, whether we ought to set

aside the nonsuit though granted on insufficient grounds, the case being, that the declaration does not disclose a sufficient cause of action. Formerly it was not unusual to nonsuit for substantial defects in the record, although there was no failure in proving all that was averred; but that is not now the practice in England. The defendant is left to take his exception to the insufficiency of the declaration in another manner, and, except perhaps in some very extreme cases, that appears to be the more proper course.

For all that we know there may have been a presentment to the maker in this case, and notice to the indorser; and the plaintiff may have only omitted to aver it because he imagined it unnecessary, from the circumstance that the note was taken by him after maturity.

If that should be so, he may perhaps succeed in an application to amend his pleadings, and justice would then be ultimately done, at less expense than by allowing the nonsuit to stand, and leaving a new action to be brought.

If the defendant had demurred to the declaration, the plaintiff might have amended by averring presentment, and perhaps was in a condition to prove it. We think, therefore, that the judgment awarding the nonsuit should be reversed, because the nonsuit was granted for a supposed defect in not proving the issue upon the indorsement, when in fact all that was legally put in issue by that plea was proved; and that the verdict for plaintiff should be set aside, and a new trial granted without costs.

Per Cur.—Judgment below reversed.

RENNIE V. JARVIS.

Promissory note—special pleas.

Endorsee against maker, upon an overdue note—Pleas, setting out the special circumstances under which the note was originally given, and denying thereupon the right of the payees to negotiate the note. *Held, per Cur.*, Pleas no defence as to a certain portion of the note, but a good defence as to the balance.

The plaintiff sued as indorsee of a promissory note, made to the defendant, on the 21st of September, 1847, payable in ninety days, to Messrs. Gamble & Boulton, or order, for 102*l.* 4*s.* 6*d.*, indorsed by the payees to the plaintiff.

Pleas: 1st. That the payees did not indorse the note to the plaintiff.

2nd. That Messrs. Gamble & Boulton held the note when it became due, and was then indebted to the defendant in a large amount, for money had and received, which defendant claimed to set off; and that plaintiff took the note from them when it was overdue, without giving any value for it.

3rd. That the note was made to Messrs. Gamble & Boulton, for the purpose of being discounted at the Bank of Upper Canada, for the benefit, and in order to pay out of the proceeds 55*l.* then due by the defendant to J. G. Spragge, Wm. Cayley, and Messrs. Gamble & Boulton, as trustees for St. George's Church, and to pay out of the residue a sum due by the defendant to Silas Burnham, that the note, at the time it was made, was indorsed by Messrs. Gamble & Boulton, in blank, and delivered, so indorsed, to the said W. H. Boulton, for the purpose of procuring the same to be discounted; that the note never was discounted, but remained till it was overdue, viz., till the 31st of March, 1848, in possession of W. H. Boulton; and that W. H. Boulton, being then possessed of the note, and without having satisfied either of the said debts due by the defendant, transferred and delivered the note, so indorsed, to Messrs. Harris, Murray, and Wakefield, without any consideration paid by them; and that on the 10th of July, 1848, knowing the purpose for which the note was made, and while the debts so due by the defendant were unpaid and unsatisfied, transferred and delivered the note, so endorsed, to the plaintiff, without consideration; and the defendant averred, that his debts to the trustees of St. George's Church and to Silas Burnham, were still unpaid.

4th. Defendant pleaded that the note, being given for the purpose set forth in the 3rd plea, Messrs. Gamble & Boulton endorsed and delivered it, after maturity, to the plaintiff, without having paid the said debts; and that at the time of such indorsement, the plaintiff had notice of these facts; and the plea averred, that the debts due by the defendant to his trustees, and to Mr. Burnham, were still unpaid.

The plaintiff replied *de injuria*.

It was proved at the trial that the note, which fell due on the 23rd of Dec., 1847, was about the 1st of April, 1848, delivered by Mr. Boulton to Mr. Harris, one of his trustees, with the rest of his assets, to be applied towards the satisfaction of his creditors; that he did not, at the time of such delivery, give any particular account of the circumstances under which he received this note, but did afterwards state them to the trustees; that on the 22nd of July, 1848, Mr. Harris transferred the note to the plaintiff Rennie, in part payment of an incumbrance on Mr. Boulton's real estate.

The purpose for which the note was made, and the circumstances under which it had been retained by Mr. Boulton, until he transferred it, were proved by him to be these:—He swore that he, and three other gentlemen named composed the building committee of St. George's Church; that he alone had acted in the matter, and made payments to the builder; that there had been no formal contract between the builder and the committee, or with any one, but that he had from time to time made payments to the builder; that he had other transactions with the builder, on his individual account, and had settled with him for the whole, including the costs of the church, by payments made to the builder, and by his notes, on the latter of which there was a portion yet due.

It was proved that at a sale of pews in the church, made by the direction of Mr. Boulton, the defendant became the purchaser of one of the pews, for the price of 55*l*.

Then it was further proved, that one Burnham, who had been a merchant in this town, absconded, largely indebted to many persons; that his books and papers had been placed in the hands of Messrs. Gamble & Boulton, who had been employed by several of the creditors to collect the debts; that a demand was made by Messrs. Gamble & Boulton, upon the defendant, for a debt of 40*l*. and upwards, appearing to be due by him to Burnham; that he contended he had paid it, or said that he thought he had, but it was agreed between him and Mr. Boulton, that he should give his note to Messrs. Gamble and Boulton for the amount of the price of the pew in St. George's Church, and for this

demand of Burnham's estate; on the understanding, that if he could produce receipts to shew that he had paid Burnham, it should be made right to him. No such proof was given.

With respect to the debt due to Burnham's estate, Mr. Boulton stated, that the sum claimed from the defendant had been credited to the estate of Burnham, and charged to the defendant in the books of Messrs. Gamble & Boulton; that they were employed by several of the creditors of Burnham to collect their debts, and had brought suits for them and obtained judgment, and had got from the sheriff the books of Burnham's estate, when on demanding from this defendant the debt charged against him, he consented to give the note now sued on. No suit had been commenced against the defendant by any creditor of Burnham's estate, under the Absconding Debtor's Act. The sheriff was examined, and stated, that he held several attachments against Burnham.

The note given by Mr. Jarvis had never been offered for discount. Mr. Boulton stated, that it had been indorsed by him in the name of Gamble & Boulton, for the purpose of discount, but that it had remained in the hands of Gamble & Boulton, till April last, long after it was due, when he assigned it (that is, delivered it over) to his trustees for the benefit of his creditors.

Mr. Gamble was also examined, who stated that Mr. Boulton had authority to indorse for the firm; that he, the witness, had transferred all his interest in the affairs of Gamble & Boulton, to Mr. Boulton, who assigned the same to his trustees.

It was contended on this evidence, that Messrs. Gamble & Boulton had a right to deal with the note as they had done, and that the defendant was liable to the plaintiff as holder, for valuable consideration.

It was not shewn that the defendant had not been acknowledged as proprietor of the pew, or that he was exposed to any demand upon him for the price of it, as remaining unpaid, or that he had been in any way molested on account of the debt supposed to be due to Burnham's estate.

It was objected by the defendant's counsel, that Messrs. Gamble & Boulton had no authority to take the note on account of any debt due to Burnham, or for the price of the pew; but that the defendant was liable for that to the four trustees for the church, composing the building committee, and not to Mr. Boulton alone; that there was no transfer of this note by Messrs. Gamble & Boulton, to Mr. Boulton alone, nor any evidence of any creditor of Burnham having sued under the statute, as for a debt due to Burnham's estate, which could alone give Messrs. Gamble & Boulton authority to receive the debt from this defendant. These objections were over-ruled. Verdict for plaintiff, 107*l.* 11*s.* 9*d.*

Gwynne obtained a rule for a new trial on the law and evidence, and for misdirection, or that the verdict be reduced to 53*l.*, with interest from the date of the note. *D. B. Read* shewed cause. The cases cited were—*Marston v. Allen*, 8. M. & W. 494; *Smith v. Knox*, 3 Espc. 46; *Chitty on Bills* 89; *Darnell v. Williams*, 2 Stark, 166; *Bromage v. Lloyd*, 16 Law J. Ech 257; *Tolhurst v. Notley*, 12 Jurist 43; *Adams v. Jones*, 12 A. & E. 455; *Treuttel v. Barandon*, 8 Taunt. 100; *Borough v. White*, 4 B. & C. 325; *Carman v. Edward*, 9 C. & P. 596; *Whitehead v. Walker*, 10 M. & W. 696; *Hayes v. Caulfield*, 5 Q. B. R. 81.

ROBINSON, C. J., delivered the judgment of the court.

We do not consider that this case is similar to that of *Marston v. Allen*, 8 M. & W. 494, which the defendant's counsel cited, for in this case it is plain, that the defendant made his note to Gamble & Boulton, with the intent that they should negotiate it, for the purpose of paying the debts spoken of, which they could not have done without indorsing it; and when Mr. Boulton, one of the firm, did endorse it, there is no doubt that that was done with the view of transferring the interest in it to the holder, whenever it should be made use of.

To be sure, there was no intention of transferring the note to Mr. Wakefield, or to this plaintiff, at the very time when the names of the payees were endorsed on the note; but the

payee giving a new destination to the note, after he has indorsed it, is a common circumstance.

It is never required, that the indorsement and the delivery to the holder should be simultaneous or that both acts should have reference to the very holder who afterwards sues upon it.

Upon the first plea, the plaintiff was entitled to recover, for no doubt the payees did intend to transfer the note—one of them did actually transfer it; and had the concurrence of his partner, as was proved by Mr. Gamble, in making use of it for his own purpose; admitting it (I mean) to be a security which Messrs. Gamble & Boulton could rightfully have negotiated under the circumstances, for any joint purpose of their own.

The 2nd plea, of set-off, there is no question about; there was no evidence given in support of it.

Then that brings us to the 3rd and 4th pleas. Does the evidence substantiate a defence under either of them? They are similar pleas—the one only differs from the other in regard to the manner in which the plaintiff is said to have taken the note. In one plea, the indorsement is laid to have been direct from Gamble & Boulton to the plaintiff; in the other, Messrs. Gamble & Boulton were said to have indorsed the note to Wakefield and the other trustees, who indorsed to plaintiff.

To maintain either plea, it was necessary to shew the two debts unpaid. At the trial, the case turned upon that question of fact. As regards the price of the pew, we must take the facts from Mr. Boulton's evidence, which is uncontradicted: and as he represents it, he was the person entitled to receive the money, having, as he swears, paid the price of the church to the builder, and being entitled in consequence to receive the price of the pews sold, which was to form part of the fund for building the church: he swore, moreover, that he was the person who had to receive and pay out all the money.

Nothing to the contrary of this was shewn, nor was it shewn that the defendant has not had the full enjoyment of the pew; or that his right to it, as having paid for it, is not

fully acknowledged; or that he has been ever since charged with the price, or has had any demand made upon him for it; or that he is in fact held liable to any one for the money. If the defendant had, on the 21st of September, 1847, made his note to Mr. Boulton, or to Gamble & Boulton, for the price of the pew alone, and one or either of them were now suing the defendant upon it, I do not see how it can be doubted that the evidence given on the trial would have proved a right to recover.

How the legal title to the pew as a freehold is in fact vested—whether the defendant has it or has had or will have any difficulty in obtaining it, was not shewn on the trial. In the absence of any evidence, or even of any complaint on that point, I conceive the right to be recognized as the purchaser, is a sufficient consideration to support the note, which is in the common form.

The defendant may very naturally consider that he has a right to complain of the transaction, taking a different course from what was contemplated, for he may have been willing to give a note at ninety days, to be discounted at a bank, with a usual and understood privilege of renewal, though he would not have given a note at ninety days, which the payees were to be at liberty to transfer as they pleased, because that would make him the debtor of any person to whom it might be transferred, and would place him at the mercy of such person at the end of the ninety days; but yet I think no legal principle can be relied on, for supporting a denial of the right of action, on account of the negotiability of this note otherwise than through the bank.

According to Mr. Boulton's evidence, so far as the 55*l.*, the price of the pew is concerned, the note was given for a debt actually due to him, and of which he was in a condition to exact payment. The discounting it, in the mean time, would be an accommodation to him, by putting him sooner in possession of the money; but when that note came to maturity, he could sue upon it, or rather the payees could, or he under their indorsement, and if so they could transfer it to any one.

Upon Mr. Boulton's evidence, the note, I think, (so far as

the 55*l.* is concerned) must be looked upon as made for a debt, due either to Mr. Boulton, or to Messrs. Gamble & Boulton, and which they were thereby admitted to have a right to receive.

The other part of the sum for which the note was given, namely, the debt due to Burnham, stands on a different ground. There is nothing to shew the defendant acquitted as to that debt. Mr. Boulton only states, that he believes he had charged it to the defendant, in the books of Gamble & Boulton, and that he had credited the estate with it, but it was not shewn that that had been done; and that was not the kind of payment that the note was to produce—it was to be discounted, in order to raise money which was to be applied in paying the debt.

Messrs. Gamble & Boulton's giving credit on their account to Burnham's estate, might or might not have the effect of producing the money, according to circumstances; and at any rate, they as solicitors, giving credit for money which they had not received, and leaving to Burnham's creditors only a recourse upon them, was no payment of the money, such as would acquit Mr. Jarvis toward any creditor of Burnham's.

As to that portion of the note, therefore, if the payees were now suing on it, it must be held to be without consideration; and the plaintiff having taken it when it was overdue, the same defence can be set up against him.

When Mr. Boulton was transferring that note to the plaintiffs, three months after it came to maturity, it was not for the purpose of raising money to pay the debt to Burnham, nor had he in fact paid the money to Burnham, but leaving that debt unpaid, he negotiated the note for a purpose of his own, and wholly beside that for which it was given.

This portion of the note, in respect to which the consideration fails, being of a definite amount, the note being transferred to the plaintiff when overdue, and transferred to plaintiff for a debt already due, and not for money paid out upon the note, and confiding in its validity, we are of opinion the verdict should be reduced, by striking out the debt to Burnham and interest.

We understood from the argument, that the desire of the parties was to obtain our opinion whether, under the circumstances, the plaintiff was entitled to recover for the whole amount of the note, or for a part only, or whether the defendant should have a verdict. And if there was any doubt, whether this is a case in which the special pleas referred to could be sustained in part, the effect of our opinion if it were against the defendant on that point, and if the objections were insisted on, would have been that we should have granted a new trial, and allowed the defendant to amend his pleading by making his defence against that part of the amount of the note which was intended to cover Burnham's debt the subject of a distinct plea, in bar of that portion of the amount only.

Per Cur.—That verdict be entered for plaintiff for the amount of 55*l.*, with interest from the time of the note falling due.

JOHNSON V. HEDGE.

Slander—inducement of prefatory matter and colloquium when necessary to support innuendoes.

Held, Per Cur.—In an action of slander, where the declaration contained three counts—the first charging that defendant intending to cause it to be believed that the plaintiff had been guilty of sodomy, in a discourse which the defendant then had of and concerning the plaintiff, spoke the words following: "I saw Peter (meaning the plaintiff) with the heifer." (Meaning that he, the defendant, saw plaintiff commit the crime of sodomy with the said heifer.)

The 2nd count charging, that the defendant intended as aforesaid, in a certain other discourse which he then had of and concerning the plaintiff, spoke the following words: "I (meaning the defendant) saw Peter (meaning the plaintiff) with the heifer, (meaning the defendant's heifer) just at the cross-way." (Meaning that the defendant saw the plaintiff then commit the crime of sodomy with the defendant's heifer.

The 3rd count charging, that the defendant further contriving as aforesaid in a certain other discourse which the defendant then had of and concerning the plaintiff, spoke, &c., the words following: "I (meaning defendant) have seen Peter Johnson (meaning the plaintiff) with my heifer." (Meaning the defendant's heifer.) "Peter Johnson (meaning the plaintiff) is the man that did it, and I (the defendant) can swear, within a foot, to the ground where he (meaning the plaintiff) stood at the time." (Meaning the ground on which the plaintiff stood when he committed the crime aforesaid.)—That the declaration was bad in arrest of judgment—on the ground that the words "charged" in the various counts did not of themselves import what was charged as their meaning—and that there was no sufficient inducement or statement of prefatory matter to which the innuendoes in the declaration could refer.

ROBINSON, C. J.,—dissentiente.

Action for slander.—1st count charged, that the defendant

intending to cause it to be believed that the plaintiff had been guilty of sodomy, in a discourse which the defendant then had of and concerning the plaintiff, spoke the words following: "I saw Peter (meaning the plaintiff) with the heifer." (Meaning that he, the defendant, saw plaintiff commit the crime of sodomy with the said heifer.)

The second charged, that the defendant intended as aforesaid, in a certain other discourse which he then had of and concerning the plaintiff, spoke the following words: "I (meaning the defendant) saw Peter (meaning the plaintiff) with my heifer, (meaning the defendant's heifer) just at the crossway." (meaning that the defendant saw the plaintiff then commit the crime of sodomy with the defendant's heifer.)

The 3rd count charged, that the defendant further contriving as aforesaid, in a certain other discourse, which the defendant then had of and concerning the plaintiff, spoke, &c., the words following: "I (meaning defendant) have seen Peter Johnson (meaning the plaintiff) with my heifer." (Meaning the defendant's heifer.) "Peter Johnson (again meaning the plaintiff) is the man that did it, (thereby meaning who did commit the crime aforesaid), and I (the defendant) can swear, within a foot, to the ground where he (meaning the plaintiff) stood at the time." (Meaning the ground on which the plaintiff stood when he committed the crime aforesaid.)

P. Vankoughnet obtained a rule to shew cause why the judgment should not be arrested, on the ground that the words "charged" in the various counts, did not of themselves import what is charged as their meaning, and that there was no sufficient inducement or statement of prefatory matter to which the innuendoes in the declaration could refer; and also, that the words were not stated to have been spoken of and concerning the plaintiff; or why the verdict should not be entered for the plaintiff on one count and for the defendant on the others.

H. Eccles shewed cause.

The authorities cited were: *Law Times*, 9th Decr., 1848; 2 Cr. M. & R. 78; 1 Ch. Pl. 415; 9 A. & E. 282; 1 Saund. 243, note 4, 286, note.

ROBINSON, C. J.—I tried the cause, and at the trial it appeared to me to admit of doubt whether the words, as laid in either of the counts, were sufficiently proved to entitle the plaintiff to recover.

The exact words need not be proved, but there is an embarrassing inconsistency, I think, in some of the decisions, even in modern times, as to the degree in which the proof can be allowed to vary from the words laid.

Upon such consideration as I could have at the trial, I thought all the counts were substantially proved, or rather I did not feel that I could pronounce them not to be sufficiently proved, and therefore the verdict was taken generally. I think still that the different counts were supported, but it admits of doubt.

The words "*with my heifer*," and "*at my heifer*," do not necessarily mean the same thing. Of the two expressions, the former conveys the less injurious meaning. The proof, therefore, differed on that side the least favorable to the plaintiff. The declaration lays the words in such a manner as makes their imputed sense less obvious, but the jury being satisfied, as we must suppose they were, that the defendant intended, by the words spoken, to impute the particular crime alluded to, we must look upon him as uttering the words with that view, and under those circumstances I consider that the words "*with*" or "*at*" would be indifferently used to convey the same idea. If the defendant, having no such malicious intention as the jury have found he had, was desirous merely of stating as a fact that he had seen the plaintiff driving the heifer along the highway, he would have used the word "*with*," and clearly not the other word; and then those words in their ordinary sense, that is, I mean the same words which are laid in the 1st and 2nd counts, would convey no charge of an offence against the plaintiff, nor indeed of anything disparaging.

So that I view it in this light:—If the defendant spoke the words charged in the first or 2nd counts for no such purpose as is charged in the declaration, then of course the plaintiff has no right of action upon those counts, independently of the variance in the words. If he did speak with

the intent and for the purpose alleged, then I think that the word "*with*" or "*at*" would convey the same meaning and would be indifferently used, and that the proof corresponds closely enough with the words laid, although one preposition is substituted for another; for both mean the same thing when spoken in that sense.

Then as to the 3rd count—there are some words laid in it which are not proved at all; but it is not always necessary that all the words charged should be proved; the words as they are laid are certainly more significant and pointed in their meaning; but the question is whether of those words which are charged in that count, enough were not proved to support an action without the aid of any words charged, but not proved; and whether their plain and obvious charged sense was, or was not, explained away by other words proved to have been spoken at the time, though not charged in the declaration.

I am not without doubt, as regards this count, as well as the others; but the opinion I have formed is that the evidence sufficiently sustained it. The variance in regard to the several counts between the words "I saw Peter," and "I have seen Peter," was not material, I think.

I have compared the proof with the declaration, although the case is not before us on a motion for a nonsuit or new trial; because, an alternative of the rule is, that if the court finds the verdict sustained, on any one or more counts only, it shall be entered for the plaintiff on such count or counts, and for the defendant on the others. This is what the defendant himself applies for.—Douglas, 361; Barnes, 478.

The result of my examination of the record and evidence, does not lead me to the conclusion, that we can on clear grounds act on this alternative of the rule; for I think the verdict may be held to be supported by the evidence in regard to each of the counts, though not without difficulty and some room for doubt as to all of them.

We have to consider then the plaintiff's motion to arrest the judgment, and indeed it would be necessary, at any rate I think, to dispose of that for; if any of the counts do not lay a good cause of action, this does not seem to be a case

in which we could confine the verdict to the other counts, in order to get rid of the difficulty; for the counts do not agree in their statement of the words, and there was evidence applicable to all the counts, so that we cannot see on which count distinctly the jury have given their verdict. Neither counts contains all that the defendant was proved to have said.—Douglas, 377.

Whether the words laid in any of the counts will support an action, has been questioned. I believe my brothers are of opinion that they will not, and are clear that those charged in the first and second counts will not, which are simply "I saw Peter *with the* heifer," and "I saw Peter with my heifer, just at the cross-way."

It is objected that these counts are clearly insufficient for want of any prefatory averment of facts previously known to the hearers, or reported to or suspected by them, which might have lead them to give such a sense to the words as the declaration ascribes to them, or of any statement of a colloquium respecting the odious crime referred to; and that without such statement of a colloquium, or of any prefatory matter, the innuendo is inadmissible, being an unwarrantable extension of the meaning, for which no ground is shewn.

In disposing of this motion in arrest of judgment we can only look at the record, and for all we can tell, there may have been no previously existing facts known or supposed by any body, nor any conversation at the time, except the very words laid in the declaration; and the hearers may have had nothing of that kind to point to the meaning of the words spoken. It may not be from any omission of the pleader that no averment of antecedent matters nor any colloquium is seen on the record.

It may be that nothing of the kind could have been stated with truth, and unless some such thing could have been proved, it would have been idle and useless to aver it.

The fact may have been, as upon this record we must take it to have been, that the defendant, without any preface or explanation further than we see, and without any previous cause of suspicion in the mind of the hearers, may have

uttered to them the words alleged respecting this plaintiff, of whom the hearers may not, up to that moment, have known or heard or suspected anything which could tend to make them understand what they were hearing from the defendant, in any other sense than if the subject of the conversation had been then wholly new to them.

The question then is this: Is a declaration in slander sustainable, which merely states that the defendant "maliciously intending to cause it to be believed that the plaintiff was guilty of the crime," &c., "in a discourse which he had," &c., concerning the plaintiff, spoke the words following: "I saw Peter with *my* heifer," or as charged in the first count, "I saw Peter with *the* heifer;" if it would, then the innuendo is of no consequence one way or the other.

There is no doubt that a multitude of cases have been decided, which would shew such a declaration to be insufficient; but we must look with great caution at early decisions in actions of slander, for the courts were long in arriving at satisfactory and consistent opinions as to the principle on which the action should rest. In the different digests of old cases there is an astonishing inconsistency in the decisions, so much so that nearly half of the cases collected in them are cited for the purpose of proving that the other half are not law.

In Lord Holt's time the law of slander began to be placed on a just and reasonable footing, and even so early as in Lord Hobart's time, in *Fleetwood v. Curley*, where the words complained of had not obviously the application ascribed to them, the court remarked that if the hearers did not so understand the words they would not be actionable; "but the slander and damages," they say, "consist in the apprehension of *the hearers*."—Hob. 268. So in a manuscript case reported in *Vin. Abr.* 507, it was laid down "that the question is only what was *understood by the hearers*." In *Gilbert's Reports*, 117, it was held that the words "I know Harrison will go off before this time twelve month," being spoken of a tradesman, meant bankruptcy. It was objected that for want of averment the "innuendo could not carry the words beyond their strict meaning;" but Parker, C. J.,

said "the rule now is, that the words shall be taken in the sense the hearers understood and not in *mitiori sensu* as formerly, and therefore no innuendo was necessary; but if it were, it was well laid in the plea." Selwyn, N. P., 127, (9th Edn.); 2 Stark, Ev. 629; Stark on Libel, 92-3.

So in *Penfold v. Wescote*, 2 New Rep., 335, the language of the court affirms the same principle, though to be sure, the words laid there were such as plainly conveyed a charge of theft, and the argument was that they were not used with such intent, but as words of mere general abuse. Sir James Mansfield said, "the jury ought not to have found a verdict for the plaintiff, unless they understood the defendant to impute theft to the plaintiff. The manner in which the words were pronounced, and various other circumstances might explain the meaning of the word, and if the jury had thought that the word was only used by the defendant as a word of general abuse, they ought to have found a verdict for the defendant."

I think the same doctrine equally applies here; the words "I saw Peter with my heifer," might be spoken innocently, meaning nothing more than that he saw him driving her home, or from home, or perhaps that he had found her after she had been lost, or that he was in the act of stealing her, which would shew a different meaning from that imputed; but though the words might mean any of these things, they would not necessarily convey any one of these meanings more than another, or more than the one laid.

I feel it necessary to determine, first, whether it is or is not possible that these words might be so uttered as that, without preface or explanation, or allusion to any thing farther, or without any thing particular being known or suspected by the hearers, by reason of any thing previous, they might clearly understand from them that the defendant meant to impute to the plaintiff what the declaration alleges he did mean. I cannot truly say that I think it not possible, for I think nothing is more probable than that just those words might be so spoken, as to leave no doubt in the minds of the hearers that the defendant did mean to fasten upon the character of the plaintiff that horrible imputation.

The tone of voice, the look of horror and disgust, or of distress, at the ruin which must follow the exposure, heightened by gesture, all combining to form what Chief Justice Mansfield calls "the manner in which the words were pronounced," might, I fully believe, impress the hearers plainly and unmistakeably with the conviction that the defendant did mean that which the plaintiff alleges him to have meant, and nothing else.—5 E. R. 471. The words do not necessarily mean any thing else; and if they are capable of that meaning, then I think, as Mr. Justice Grose states in his judgment, in *Woolnoth v. Meadows*, 5 E. R. 67, "a court of justice must read the words in the same sense in which the hearers would at the time they were spoken understand them;" otherwise, this injustice must happen, which in a case like the one before us would be very cruel, that a person keeping clear of the precise language generally used for describing a disgusting crime, might convey to a crowd, in language which would be well understood by them, an imputation against his neighbour, which would blast his reputation for ever, and yet the person injured could have no redress.

I am supposing a case where the words, as spoken, would be of themselves well understood without the aid of preface or explanation, or connection with any previous fact, and when, for any thing we can know, there consequently could be nothing averred besides the speaking of the words with the malicious intent described.

If the words spoken had a precise and confined sense, incompatible with that charged, and plainly pointing to something different, the case would be otherwise. But these are words which may have had an innocent meaning or a malicious and most injurious meaning. The plaintiff declares that the defendant spoke them maliciously, intending (as he might) to cause it to be believed that the defendant had committed the crime mentioned. He undertakes therefore to prove that as part of his case. I could not say *a priori* that he could not prove it; for I think it to be very possible that he might prove it to the entire satisfaction of the jury, merely by proving the words and the "manner in

which they were pronounced ;” and we see that he did in fact prove it to the satisfaction of the jury, for they gave the plaintiff a verdict. May we not then say in this case, as was said by Parker, C. J., in *Ward v. Reynolds* (Easter, 12 Anne), “It is very odd that, after a verdict, a court of justice should be trying whether there may not be a possible case in which words spoken by way of scandal might not be innocently said ; whereas, if that were in truth the case, the defendant might have justified or the verdict have been otherwise.”

In *Coleman v. Goodwin*, 3 Douglas 91, Ashurst, J., observed : “The effect of the words on the hearers is what is to be considered. The determinations in the old books are a disgrace to the law.” In that case there was an averment of prefatory matter, the words being of themselves perfectly innocent. There is none in this case, but the principle is not the less applicable, I think, when the words are on the face of them capable of the meaning imputed to them, and all that can be said against it is, that they do not fully or plainly import it.

They may in such case have been used innocently, or they may not. It is for the jury to judge. Suppose a person, evidently meaning to accuse another of something wrong, should say to him in the hearing of a crowd—“Why could you not let your neighbour’s hay alone?” He might mean by that, only to insinuate that he had mischievously tossed it about or injured it ; but he might also shew so plainly, by his way of saying it, that he intended to insinuate that the other had pilfered his neighbour’s hay, that no one who heard him could have any doubt what he meant.

Mr. Starkie, in his *Treatise on Slander*, lays down the legal principles thus : “It is incumbent on the party who complains that he has suffered from an imputation of crime, to shew with certainty the injurious nature of the communication.”

In order to establish this, two things are necessary. 1st. That the words or signs used should, *either of themselves* or by reference to circumstances, *be capable* of the offensive meaning attributed to them. 2ndly. That the defendant

did in fact use them in that sense. "The *capability* of the words or signs to bear a particular construction must appear upon the plaintiff's statement of his case, for otherwise it would not judicially appear that he was entitled to recover. That the defendant did in fact use them in that sense, is a matter of evidence to be decided upon at the trial. It may, however, be necessary to observe here, that if it appear, from the words or signs themselves, or from circumstances, *that they are capable* of conveying the particular meaning attributed to them by the plaintiff, it will, after verdict for plaintiff, be taken for granted that they were in fact used to convey such meaning; for that is a matter upon which the jury alone can decide, and which they must be convinced of, before they can give their verdict for the plaintiff. Any objection, therefore," Mr. Starkie adds, "to the words or signs, as stated upon the record, is grounded upon the supposition that it does not sufficiently appear *that they are capable of an actionable meaning*." In another part of this work (page 93) he re-states these principles.

Now the difficulty I feel in this case is, that I cannot say that the words "I saw Peter with my heifer," are not capable of conveying the sense imputed to them; I can only say that they do not of themselves obviously import it—but they do not mean any thing inconsistent with such a charge; and whether they were spoken in order to convey that meaning or not, is a matter of which the hearers might be well able to judge, by merely hearing the words spoken, and seeing the manner in which they were spoken; that it was for the jury to find from the evidence of the hearers whether the words were spoken with that intent or not; and that, as they have found for the plaintiff, we must take it to have been proved to them that the words were spoken for the malicious purpose and with the meaning charged.

The case of *Holt v. Scholefield*, 6 T. R. 691, does, however, appear strongly opposed to this view, for there Lord Kenyon and the other eminent judges who decided that case lay it down as a principle "that either the words themselves must be such as can only be understood in criminal sense or it must be shewn by a colloquium in the introductory part that they have that meaning.

Tried by that test, undoubtedly this declaration fails, for it cannot be said of the words in the first and second counts of this declaration, or indeed in the last count, "that they *can only* be understood in a criminal sense." The difference between the principle laid down by Lord Kenyon and that which Mr. Starkie has deliberately laid down as deducible from the current of authority is, that Lord Kenyon holds it to be necessary when no colloquium is laid, that the words should be such as *can only be understood* in a criminal sense ; while Mr. Starkie conceives the principle to be, that in such a case, the words must in themselves *be capable* of the offensive meaning attributed to them.

There is a clear and very wide difference between these two principles, and I think Lord Kenyon cannot have intended to have expressed himself in the terms he is reported to have used as applicable to all cases, though as applied in the case before him, the principle was correct. There it had been said of the plaintiff, by the defendant, that he had "foreswore" himself. It would have been better perhaps, and more reasonable, always to have held that to charge another with having "foresworn" himself was an actionable slander, without shewing that the defendant clearly referred to a false oath, on which perjury could be assigned ; but the distinction has always been acted upon and could not now be disregarded. Then in a case in which the bystanders heard and knew nothing more than that one person said of another that he was foresworn, that as that did not necessarily mean that he was perjured, the hearers had nothing to guide them to the conclusion that perjury in some judicial proceeding was intended. In affixing that meaning to the word then, they would be acting without ground, for I cannot conceive that there could be anything in the manner of speaking the word that would point to one meaning more than another. It meant one kind of fore-swearing, that is certain ; but there could be nothing to point out what kind, without some explanation.

But we can say, I think, of such crimes as murder, theft, or that most detestable of all crimes which is referred to on

this record, that words may be spoken in such a manner as will clearly convey to the hearers, without further explanation, the imputation of having committed them, when at the same time the words in themselves, if we think of nothing but the letters and syllables which compose them, do not clearly convey such a meaning, and that only; though *they are capable of that meaning*.

If we take the case of a man saying of another, "he did not take," or "he did not hide," or "he did *not* steal" his master's spoons, it cannot be said of either of those assertions that they grammatically and unnecessarily import that he *did* steal his master's spoons and *could* mean nothing else; on the contrary, that might be said most innocently, and for the very purpose of declaring the conviction that plaintiff was innocent of any such matter, which some one else may have charged him with.

So also, if the words here had been "I did *not* see you in woods busy with my heifer," it cannot be said that such words grammatically and necessarily imported the commission of an unnatural offence, and could mean nothing else; still there are cases (such as Holt v. Scholefield and many others) in which the language of the judges would import that because it could not be said in these cases that the words of themselves were only capable of importing felony; therefore, without an averment of prefatory matter or a colloquium, they will not sustain an action.

But I gather from a consideration of the general doctrine stated, and from what seems to me a reasonable application of the cases, that in any of these instances which I have just mentioned, an action would lie if the jury are convinced, from the evidence, that the defendant spoke the words in the malicious sense alleged; for, I think, the hearers could well understand whether the words were so spoken or not, and that it is the evidence upon that point which must govern.

I admit that if one man says of another, I saw him *with* my heifer, or I saw him busy with my heifer, he uses words of which it cannot be said that they *are capable* of no other meaning than that which in this declaration is charged; but

in my opinion he uses words which *are capable of* that meaning; that they may be so spoken as to convey it clearly to the bystanders, though there may be not another word uttered, nor any inducement of prefatory matter to be stated in the record, because the whole might be a malicious invention.

Then if they are capable, from the manner in which they were spoken, or without any additional words or any extrinsic fact, of being so understood, the question is were they so spoken and so understood; and if they were then I think the action lies, and must be well laid, without any averment, when there was nothing to aver.

The cases which turn on the word *foreswear* are, as I have already explained, clearly not applicable, because the bystanders could not guess without other explanations, whether an oath in a judicial proceeding was intended or any other oath.

So, if A. says of B., "I saw him take six bushels of wheat from his neighbour's barn," it cannot be said the words are capable of no other meaning than that he stole the wheat, but inasmuch as they are capable of that meaning, an action I conceive will lie for them, and it will be only necessary to aver that defendant maliciously spoke the words with intent to charge plaintiff with felony.—Holt's Rep. 405.

The only principle which, as it seems to me, can be consistently carried through, is this—when the words spoken have clearly in their ordinary sense a meaning of a different kind from that which the declaration ascribes to them, but yet the attendant circumstances shew that they were in fact spoken in order to convey the sense which is imputed to them, then those attendant circumstances must be averred, and of course must be proved; but when all that can be said is, that the words come short of obviously conveying the meaning ascribed to them, though they do not obviously mean anything different from it, there it is not because the speaker has kept clear of the precise expression which would properly define his meaning, that the words will not bear an action unless there be an inducement laid of prefatory matter, which the person injured may not be able to allege. In such a case it may be said that the words do not ne-

cessarily mean what is ascribed to them, but they *may* mean that and do not necessarily mean anything different from or inconsistent with the signification imputed to them. Then what the defendant did mean is in such a case a matter of evidence; and nothing more is necessary than to satisfy the jury, that though the words might be spoken and might be understood in *mitiori sensu*, they were in fact spoken and understood in *graviori sensu*.

I find it impossible to concur in the judgment of my brothers, when I reflect, that the principles on which it is supported would equally admit of a person saying of another, "*I caught A. B. busy with my heifer*," in such a manner as would be understood by any one who heard him to impute the offence now in question, though the whole might be a fiction, and then nothing but the bare speaking of the words could be charged, for there would be no ground for any prefatory averment—nothing to aver.

Before we pronounce that judgment shall be arrested, which will deprive the plaintiff of his verdict, we should be clear in the opinion that the declaration contains *some* count not good in law, and which therefore could not be sustained, be the evidence what it may.

I am not clear in that opinion, and therefore do not concur in arresting the judgment, which my brothers, I believe, think should be done; but the view taken by the rest of the court is very likely to be correct, for I meet with many decisions which tends strongly to support it, though when the cases themselves are carefully examined, they admit, I think, of the distinction which in my judgment prevades them all, and which is the only one that I feel can be satisfactorily maintained.

MACAULAY, J.—The question is, not whether the evidence was sufficient to prove the declaration, but whether the declaration itself be good or sufficient, as stating actionable slander on the face of it.

Rex v. Horne, Cowp. 684, 275-8, DeGrey, C. J., says: an innuendo means nothing more than the words *id est, scilicet* or meaning as aforesaid, as explanatory of a subject matter sufficiently expressed before; as such a one, meaning the

defendant; as such a subject, meaning the subject in question. But as an innuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning, unless something is put upon the record for it to explain, illustrating it by the instance of the words "he burnt my barn" being extended to his barn *full of corn*, which would be not an explanation, but an addition; and then points out how the declaration should be framed to admit of that extension. In the instance supposed, the meaning of the words is extended, not in relation to their import in point of imputation, but in point of *fact*.

Rex v. Greepe, 1 Sal. 513; 1 Ld. R. 256; Com. 43; 12 Mod. 139.—It is said an innuendo is no averment, but in the nature of a prædict, serving for an explanation to point out where there is precedent matter, but never for a new charge: It may apply what is already expressed, but cannot add or *enlarge* or change the sense of the precedent words—as that Newnham meant Newnham in Devonshire—which was an additional *fact*.

Goldstein v. Foss, 4 Bing. 489; 6 B. & C., 154.—Best, J.—"An innuendo cannot add a fact or enlarge the natural meaning of the words."

Gompertz v. Levi, 9 A. & E. 282.—Patterson, J., says the foregoing case shewed that the innuendo could not be used to enlarge the meaning of words, without prefatory averments. In this case the declaration was held bad on general demurrer, the innuendo attempting to give to the words an import they did not necessarily bear, per Lord Denman, C. J., and per Coleridge, J.—An innuendo will not serve without introductory averments, unless there be a natural connection between the words and the meaning assigned to them; otherwise, to say that "he has gone to America" might be made a libel by adding an innuendo, that he did so to avoid paying his creditors.—And see Wheeler v. Haynes, 9 A. & E. 286, note; Sweetapple v. Jessy, 5 B. & Ad. 27.

Woolnoth v. Meadows, 5 East. 463.—Lord Ellenborough says: "It must be admitted that an innuendo can only explain and cannot extend the meaning of the antecedent

words; and the question therefore was, whether they did in their plain, obvious meaning, import the charge of any certain crime." Grose, J., said: "I agree the innuendo cannot extend the meaning of the words." Lawrence, J.: "I agree that if the words as laid would not in the ordinary understanding of mankind, bear the meaning imputed to them, the innuendo would not help them." LeBanc, J.: "If the words do not convey to all persons who hear them what the sense of the speaker was, I admit they cannot be extended by an innuendo." Here, the declaration was prefaced by an inducement of the defendant's intention to impute the crime as in this case. 1 Hutton 44, 3 Bul. 83; *Hawkes v. Hawks*, 8 East. 427, to the same effect; *Roberts v. Camden*, 9 East. 93; *Angle v. Alexander*, 7 Bing. 119, 122-3.

Day v. Robinson, 1 A. & E. 554.—Tindal, C. J., said: "The rule (that the innuendo might be rejected) might hold where the words in themselves imported a criminal charge, and the innuendo introduced matter that was merely useless, and not in any way altering the nature of the charge, which the words themselves would import."

Colman v. Godwin, 3 Dougl. 90.—There was a prefatory statement and colloquium. *Gardner v. Williams*, 3 Dowl. 796, 2 C. M. & R. 78; 1 Saund. 243 (n.); *Vankeuren v. Griffith*, 2 U. C. R. 423; *Weatherfield v. Wingfield*, *Law Times*, 9th Dec., 1848; *Hankinson v. Bilby*, 16 M. & W. 442; *Danes v. Hartley*, 12 Jurist, 1093. *Cook's Law of Defamation*, 93, says: "An innuendo cannot extend the sense of the words," *Kelly v. Partington*, 5 B. & Adol. 645, 3 N. & M. 117, 460 S. C.: "That to be actionable, the words must be defamatory or injurious in their nature," &c. Lord Denman: "Unless the court can see that the words themselves have an injurious meaning, no action can be maintained upon them." Parke, J.: "We can only construe the words in their grammatical sense; they impute no crime," &c.—11 M. & W. 287, 255-6; 1 Taylor's Ev. 219.

From the foregoing authorities, it appears to me that the mere allegation in the inducement, that the defendant intended to impute to the plaintiff the crime alleged, does not warrant the innuendoes to the words laid—being, 1st,

"*I saw Peter with the heifer,*"—innuendo, that he saw plaintiff commit the crime of sodomy with said heifer, none being mentioned before; 2nd, "*I saw Peter with my heifer just at the cross-way,*"—meaning that he saw plaintiff there commit sodomy with the defendant's heifer; and, 3rd, "*I have seen Peter Johnson with my heifer—Peter Johnson is the man that dit it,*"—meaning, who did commit the crime aforesaid—"and I can swear within a foot of the ground where he stood at the time,"—meaning, where he committed the crime aforesaid.

The only question could be as to the last count; but without something other than the mere words to indicate what "*did it*" referred to, it seems insufficient equally with the others. These words simply imply something previously said or understood, to which the defendant referred; and it might have been many other things than the commission of the crime alleged to have been intended.

If any thing preceded or accompanied the words, calculated to impart to them a force or meaning they did not naturally in themselves bear, it should have been stated by way of inducement or explanation, as if accompanied (as they might have been) by gestures or other circumstances giving to them the point and meaning ascribed to them in the innuendoes.

The validity of the declaration may be tested by striking out the innuendoes, and then considering whether the words are in themselves actionable, without any addition or explanation, for it contains none. I apprehend it would be clearly bad, and if so, the unauthorized innuendo cannot aid it or make it good.

So far as I can judge, therefore, I think the judgment should be arrested.

DRAPER, J.—I agree in opinion with my learned brother Macaulay, who has referred to most of the authorities on which I rely.

There are certainly many declarations, especially in text books, which appear to favour a contrary conclusion—but I think they can only be reconciled with the unquestionable authority of decided cases and with the principles of good

pleading, by assuming them to refer to the interpretation words are to receive when given in evidence on a declaration containing proper averments and innuendoes, and not as establishing that the court will so construe them on the record, unaided by explanatory matter also alleged.

In this case none of the words *per se* charge any particular crime. They may as well import larceny, or maliciously killing or wounding, as the charge imputed, and if an inducement had been laid that the heifer had been stolen, or maliciously killed, maimed or wounded, and these same words had then been set forth with a colloquium of and concerning such heifer and such larceny or malicious killing, maiming or wounding, and a proper innuendo, the words would have sustained the complaint for any such slanderous charge, as well as for the one now laid in the declaration. And if the fact had been that some person had tied some substance in flames to the heifer's horns, or rubbed filth over its udder, to play a dirty trick on the person milking it, the words, properly introduced, would as well relate to such act as to the crime charged.

There are only two things on the face of the declaration which shew that the words import a charge of crime, and so make them actionable,—1st, the statement of defendant's intention to cause it to be believed, &c.—2nd, the innuendo.

As to the first, the declaration would be equally good if it were all struck out; and for the second, it is enough to state the result of all the cases, that an innuendo is bad and renders the declaration defective, if it introduce *new* matter, or alter or enlarge the sense of the words set out, without a special inducement and a colloquium concerning it to support such innuendo.

The inducement contained in the declaration in *Vicars v. Wilcock*, 8 East. 1, shews that this declaration might have been so framed as to sustain the plaintiff's right of action, although no circumstance had really taken place explanatory of the words having been used in the sense imputed which could be truly charged on matters of fact.

The innuendo in this case being useless, for want of any preceding matter to apply it to, the declaration in reality

only charges the defendant with speaking the words, "I saw Peter Johnson with the heifer;" upon which, without any explanation on the record, I think no action will lie. The cases of Hawes v. Hawkey, 8 East. 427; Woolnoth v. Meadows, 5 East. 463; Day v. Robinson, 1 Ad. & El. 554. Angle v. Alexander, 7 Bing. 119; McGregor v. Gregory, 11 M. & W., 287; Sweetapple v. Jesse, 5 B. & Ad., 31; and Kelly v. Partington, 5 B. & Ad., 645; recognize as established law a doctrine which is fatal to the plaintiff's recovery on this declaration.

Per Cur.—Judgment arrested.

ROBINSON, C. J., *dissentiente*.

PRACTICE COURT.

HILARY TERM, 1849.

Before the Honourable Mr. JUSTICE McLEAN.

CAMERON, ONE, &C., V. WHEELER ET AL.

Copy of Process—Irregularity in.—Attorney.

The omission of the letters (L. S.) or of any mark to denote a seal in the copy of a writ—is not an irregularity.

An attorney may sue out process by another attorney, but may sign the usual notices endorsed on the process in his *own* name.

The plaintiff had commenced his action through an attorney, by suing out an attachment of privilege, and on the back of the copy of the writ the usual notices were endorsed and signed by the plaintiff in person.

He had omitted to mark on the copy the letters L. S. denoting the place of the seal in the original.

The defendant moved to set aside the service of the said writ for irregularity, with costs, on the ground that there were not on the copies served, or either of them, any letters or other designation shewing that the said writ was sealed with the seal of the court; also, that on each of the copies the plaintiff appeared to be suing by attorney and yet the several notices thereon endorsed were or professed to be

served by the plaintiff in person, and by the notices of claim on the copies, the defendants were required to pay the amount therein mentioned, with mileage, &c., to the plaintiff in person.

McLEAN, J.—The plaintiff is bound by law to serve upon the defendant *a true copy* of the original writ or process in the cause, and he cannot proceed till such original process is returned and filed, with an affidavit of the service upon the defendant of a true copy of it, together with notice in the English language to the defendant of the intent and meaning of the service, and of the extent of the plaintiff's claim and costs; the former prescribed by statute, the latter by rule of court.

In making a copy it is customary to mark on such copy some letters or the word "seal," to shew that the original was under seal and the place of such seal on the original; it must, however, be obvious that the seal cannot be copied and the addition in fact of any letters or any word to denote the place of a seal cannot possibly be a copy of the original; this objection then amounts to this, that because the plaintiff has not added something which could not form any part of the copy of the writ, he has been guilty of irregularity.

The objection is quite new to me, and as no authority was cited in support of it, and I have not been able to find any, I must assume that it is new in all respects and not tenable.

The defendants also object that though the writ issued out by the attorney, the notices endorsed on the copies are signed by the plaintiff in person.

The plaintiff had an undoubted right to sue out process by attorney, though an attorney himself. When sued out he had a right to proceed by attorney or to assume the conduct of his suit himself. He has chosen to pursue the latter course, and in his own name to give notice to the defendants of the intent and meaning of the service of the copies of process and the amount of claim to be satisfied to entitle the defendants to have proceedings discontinued. These notices are surely not the less effectual or regular, because they are signed by the plaintiff in person rather than by his attorney.

There is no irregularity complained of in the notices, except their being signed by the plaintiff, and on the authority of the case, 7 T. R., 35, Jackson v. Barnard, which is a much stronger case than this, I think the defendant's objection in this respect must be overruled.

Per Cur.—Rule discharged.

IN RE BULL V. BULL.

Award—Setting aside of.

Arbitrators refusing to give time to produce testimony will not be allowed to support their award by shewing that such testimony could have been of no service.

The parties in this case submitted, by bonds bearing date the 28th day of June, 1847, to the arbitrament of the honourable Robert Charles Watkins, Philip Ham and George Benjamin, or any two of them, all and all manner of actions, cause and causes of action, suits, bills, bonds, judgments, claims, damages and demands whatsoever; the award of the said arbitrators, or any two of them, to be made in writing under their hands on or before the first day of August, 1847, ready to be delivered to the parties, and it was agreed between them that such submission might be made a rule of court.

The arbitrators entered into the investigation of the matters referred to them, and after hearing the evidence of various witnesses, two of them, Phillip Ham and George Benjamin, made their award on the 31st July, 1847, by which they awarded that George Edward Bull was indebted to Henry Bull in the sum of £301 16s 3d., to be paid by the said George E. Bull to the said Henry Bull on demand. That the said George Edward Bull do *deliver up disclose* and *give* to the said Henry Bull all and every such orders or order as he may hold or *know of*, given by Charles Meyers the builder of the church at the river Trent, or any person on his behalf upon the building committee of the said church, thereby declaring the said orders to be the property of the said Henry Bull, and that the said George Edward Bull shall give and disclose in writing a detailed

statement of the quantities of lumber furnished by the several parties, who contributed lumber to the raft got out and furnished, partly by the said Henry Bull, or the said George Edward Bull for the said Henry Bull, and sent to Quebec in the summer of the year one thousand eight hundred and forty-six.

The third arbitrator, Mr. Watkins, refused to join in making this award, and in the affidavit which he made he said that he refused because it was not consistent with what he conceived to be right.

That a great number of the witnesses of George Edward Bull had not been examined when the award was made, and that in his, Mr. Watkin's opinion, the award should not have been made, but the time for making the same should have been enlarged, for the purpose of hearing all the testimony.

Mr. Watkins swore further, that he did not consider that there was evidence to justify the award made, or to shew that George E. Bull was indebted in the whole of the transactions to Henry Bull. That on the 21st July, previous to the making of the award, he saw George E. Bull at Trentport, that he was confined to his room by illness and unable to ride to Belleville that day, and that he wished to have the time enlarged for one month, to enable him to get all his witnesses examined, and to get witnesses from Lower Canada. That a consent on the part of the said George E. Bull was drawn up by his attorney, A. H. Meyers, Esq., and signed by George E. Bull in his, Mr. Watkins' presence, for enlarging the time for making the award. That such consent, duly executed, was brought to him to Belleville and laid before the arbitrators, but that they decided upon making the award between the parties notwithstanding, though they were aware that George E. Bull had several witnesses to be examined in the matter, who had attended at the sittings of the arbitrators for the purpose of being examined.

Mr. Watkins further stated, that if any testimony was taken by the other arbitrators in his absence no information of such proceedings, or of the taking of such evidence, was

ever, to his recollection, communicated to him by the arbitrators or either of them.

This application, supported by numberless affidavits, was made on behalf of George E. Bull, to set aside the award :

1st. On the ground that the submission being of all matters in difference, the award made no final end or settlement thereof.

2nd. That the finding of the award was that George E. Bull is indebted to Henry Bull in £301 16s. 3d., and directed that the sum be paid, thereby referring to the time of making the award ; whereas the submission only empowers an award to be made of matters at any time or times "there-tofore" arisen, and so the said award exceeded the submission and was uncertain and insufficient.

3rd. That the award was insensible and void in this, that it directed the said George E. Bull to perform acts which it did not shew his power or liability to perform, viz : to give and disclose in writing a detailed statement of the quantities of lumber furnished by the several parties who contributed lumber to the raft got out and furnished, partly by the said Henry Bull, or the said George E. Bull for the said Henry Bull, and sent to Quebec ; and also, it was insensible and void in directing George E. Bull to deliver up, disclose and give to the said Henry Bull not only all such orders as the said George E. Bull may hold, but also all and every such orders as he may know of.

4th. That the award was void in not being a final end of differences between the parties, and did not shew that the payment of the sum awarded and performance of the acts directed by George E. Bull, would release or discharge him from any further or other claim of the said Henry Bull, nor did the award profess to be a final end even of the matters therein mentioned and referred to.

5th. That the award was void and bad for misconduct of the arbitrators executing the same in refusing to give time or opportunity to George E. Bull to produce his witnesses at the arbitration, or time or opportunity to disprove certain parts of the evidence offered for Henry Bull, and also in hearing and admitting evidence for the said Henry Bull in the

absence and without the knowledge of George E. Bull, and without giving him an opportunity of rebutting or examining the same.

McLEAN, J.—It is distinctly sworn by George E. Bull that the only claim or demand filed by Henry Bull before the arbitrators, was not filed or laid before them till the last week in July, and that on the 28th of that month he received from the hands of the arbitrators a copy of that claim or demand—that on the same day he notified the arbitrators that the time for making the award would have to be extended to enable him to bring further testimony before the arbitrators; that he also notified them that some of the witnesses to be examined were in Lower Canada, but that a messenger would be immediately dispatched for them; that he was then told by the arbitrators, Philip Ham and George Benjamin, and by Henry Bull, that any witnesses he had to be examined before the arbitrators must be brought before them that week, as they were determined to close the matter that week. George E. Bull further swears; that it was impossible for him to get his witnesses from Lower Canada, in the time allowed him by the arbitrators, Ham and Benjamin, that is, between the 28th July and the 31st, the day on which the award was made, as two of the witnesses resided forty-five or fifty miles below Montreal, and others between that and Quebec.

It is not denied that the statement referred to was given to G. E. Bull, only a short time before the making of the award, nor is it denied that George E. Bull was anxious and expressed his intention to call and examine other witnesses on the subjects in controversy, but it is alleged that the statement was not given in for the purpose of making it an account against George E. Bull, but for the purpose of establishing the irregular manner in which George E. Bull had kept the books of his employer, Henry Bull, and thereby to shew that he was not entitled to the amount of salary or remuneration which he claimed; and in reference to the witnesses which George E. Bull wished further to examine, it is alleged that their testimony would have been of no use, as the only evidence which the arbitrators could have

received were the culler's or supervisor's bills of timber from Quebec.

Now, whatever the object was in giving in the account referred to, it was of sufficient importance to induce the arbitrators to furnish George E. Bull with a copy of it, and this must have been done for some purpose; if it was done to enable him to give evidence to explain or do away with the charges it contained, then time should have been allowed him for that purpose; they, however, told him that whatever testimony he intended to produce must be produced that week, as they were determined to close the submission. The time allowed then was from the 28th to the 31st July, and on the latter day, though George E. Bull was absent from illness and had made the necessary arrangement to enlarge the time, and requested that it might be enlarged to enable him to produce further testimony, the arbitrators refused to allow further time and made their award. It cannot be permitted to arbitrators, who refuse to give time to produce testimony, to support their award by shewing that such testimony could have been of no service.

By the affidavits it appears to me, that the arbitrators, in order to close their labours within the time limited by the submission, have come to a conclusion, without affording that opportunity to George E. Bull to procure testimony in reference to the account and statement furnished to him, but a very short time previously, which ought to have been allowed to him. What weight the arbitrators may have given to that statement, it is not necessary to enquire. They may have come to a very correct conclusion as to the amount due by George E. Bull to Henry Bull, but if so it could not have been affected by allowing further time for the production of evidence on the subject.

The award, as to the amount due and payable from George E. Bull to Henry Bull, is sufficiently distinct and conclusive, but the other portions of it seem to relate to matters which, from all that appears, are not connected with the controversy between these parties, and certainly are not conclusive as to the matters to which they relate, they are too indefinite in their terms and must lead to further diffi-

culties, and moreover there is nothing to show that George E. Bull can possibly comply with them.

On the ground, however, that the reference was improperly closed, when in fact there was no necessity whatever for it, and when, as appears by various affidavits, George E. Bull desired to produce further testimony, and applied for an enlargement of time to enable him to procure his witnesses, some of them from Lower Canada, I am of opinion that the award must be set aside.

Per Cur.—Rule absolute.

JUDGMENTS DELIVERED ON TUESDAY, THE 30TH JULY, 1849.

Present,—THE HON. J. B. ROBINSON, C. J.

“ MR. JUSTICE MACAULAY,

“ MR. JUSTICE DRAPER,

“ MR. JUSTICE SULLIVAN.

McLEAN, J., being in the Practice Court during the argument, gave no judgments.

SULLIVAN, J. was also in the Practice Court during the argument upon the greater number of these judgments.

CROUSE V. PARKE.

Award—Setting aside of, on grounds that the arbitrators exceeded their authority and acted corruptly.

As to the power of arbitrators, under a very general submission, to cancel an existing partnership agreement, and to award prospective damages to the partner losing by such cancellation.

An award had been made in this case in favor of Parke, on a submission by bond; which award directed, among other things, that Crouse should pay to Parke 1300*l.*, viz., 1000*l.* on the 4th December, 1848, and 300*l.* on the 4th March next ensuing.

The award was made on the 4th September, 1848; and in Michaelmas term following, a rule nisi was obtained for setting it aside:

1st. Because the arbitrators received evidence of the benefit which Crouse would derive from the cancellation of the articles of partnership, and awarded to Parke 1000*l.* in consequence of the profit to be derived by Crouse, though no such matter was in difference between them, nor was referred.

2nd. Because if any such claim had been referred, yet the evidence afforded no ground for the award, and was illegal and inadmissible.

3rd. Because the arbitrators received evidence of damages sustained by Parke, through an alleged breach of certain covenants in the articles of co-partnership, and awarded to him a large sum therefor, though no such claim was referred, and no such matter in difference.

4th. Because the arbitrators acted corruptly and partially in awarding to Parke 1300*l.* on matters not referred nor in difference, and not warranted by any evidence.

5th. Because two of the arbitrators sent the brother-in-law of Crouse to Hamilton, to employ counsel, without consulting the third arbitrator.

6th. Because the arbitrators consulted counsel, and acted on the opinion obtained through the agent of Parke, without having themselves seen the counsel, and although Marr, the third arbitrator, had never seen nor consulted him.

Both the parties are physicians and surgeons. Crouse had been practising, and was residing at Simcoe, in the district of Talbot, and Parke in an adjoining district; and in March, 1840, it was agreed between them, that they should enter into partnership for four years from the 1st of April following, on the terms of an equal division of profits; and in the articles which they both entered into under seal, was the following condition: "That before the expiration of the co-partnership, the said Crouse shall not take any other person into partnership, or give his interest to any person in the professions aforesaid, against the interest or without the consent of the said George N. Parke; but that the said Crouse shall continue his interest to the said Parke, but not interfering with such private practice as the said Crouse may be enabled personally to attend to."

After the four years had expired, the parties were in dispute about a pecuniary demand, advanced by Crouse against Parke; and an action was brought by the former against the latter, in 1846, which was still pending in May, 1848, when they entered into mutual bonds of arbitration.

These bonds recited "that they had been some time in partnership as physicians and surgeons; that divers differences and disputes had arisen and were then pending between them, with respect to such partnership and the accounts relative thereto, and with respect to other matters not connected with the partnership; and that it had been agreed between them, that all accounts relative to the said partnership, and all differences and disputes between them, as well with respect to the same as to those other matters not connected therewith (except a certain action, in which Parke had confessed judgment), should be submitted to the award of those arbitrators named." And the condition of the bond was, "That each respectively should in all things stand to and abide by the award which by the said three arbitrators or any two of them, should be made, of and concerning the said partnership and dealings, *and all accounts, differences and disputes relative thereto, and to other matters not connected therewith,* and of and concerning all actions, causes of actions, suits, claims, damages, and demands whatsoever (except as aforesaid), now or at any time heretofore had, made, moved, brought, commenced or depending by or between the said parties, so as such award to be made, &c. And further, *that after the award of the before-mentioned arbitrators, or any two of them, so made as aforesaid, the articles of co-partnership entered into by and between the said George N. Parke and John B. Crouse; as also all contracts previous to the said award (except as aforesaid), shall be null and void and no longer binding on either the said George N. Parke or the said John B. Crouse.*"

Upon this submission the arbitration took place, and the result was the award now complained of, directing 1300*l.* to be paid to Parke; of which sum, it appears from the affidavit and papers before us, 1000*l.* was given as a compensation to Parke, for the loss which he might incur from

the effect which the award must have, according to the special terms of the submission, in releasing Crouse thenceforward from that restriction in the articles of co-partnership which bound him never again to take a partner, to promote Parke's professional interests, and to interfere no farther with his practice than by attending such patients as Crouse could not personally attend.

Parke, by *Cameron*, Q. C., contended that, to lose the benefit of this stipulation was a great disadvantage to him; while on the other hand, to be relieved from it, and to be enabled to take a partner and push his professional practice to the utmost, without any regard to his, Parke's, interests, was a positive advantage to Crouse, for which it is just he should be made to pay a proper compensation.

He insisted also, that to settle this compensation was one of the matters clearly within the scope of the reference, and a point which the arbitrators must in the nature of things have been intended and expected to settle.

Crouse, on the other hand, resisted all claim on that account, contending by his counsel, *Dr. Connor* and *Mr. McDonell*, that the stipulation contained in the submission bond, that after the award, the articles of co-partnership were to be no longer binding, formed one of the considerations upon which he agreed to submit all past transactions to the award of the arbitrators; and that as it was not expressed in the bond, so it never was intended that he was to be made to pay anything for being relieved thenceforward from all the engagements he had come under in the articles of co-partnership, but simply that the articles should be no longer binding.

Cases cited on the argument.—3 E. R., 18; 2 Vez. 18; 6 Q. B. R. 637; 6 A. & E. 119, 845; 2 D. & L. 967; 9 A. & E. 522; McClelland's Rep. 393; 7 Beaven, 455; 10 Jurist, 14; 13 Price, 648; 8 Dowl. 22, 281; 8 T. R. 571; 3 Scott, N. R. 250; 1 P. Wms. 181; 2 U. C. R. 173; 4 U. C. R. 171; 5 U. C. R. 273, H. T. 5 Wm. IV; Crooks v. Chisholm; 1 Dow. N. S. 331; Watson on Awards, last ed. (1846), 55, 274; 3 D. & L. 768; 3 Moore, 243; 9 Dowl. 901; 3 Bing. N. C. 214; 3 B. & Ad. 727; 9 B. & C. 780; 15 E. R. 214;

1 D. & L. 499 ; 6 Bing. N. C. 162 ; 9 Jurist, 691 ; 1 D. & L. 225 ; 4 Price, 235 ; 3 Q. B. R. 698.

ROBINSON, C. J.—After carefully considering all that has been laid before us, I must say, that if we were allowed to determine the question of what was submitted according to the statements of the parties and on the affidavits of others, instead of looking only to the submission bonds themselves, we should still not have very clear ground on which to act. The account given by each of the parties is probable enough on the face of it to be true, and we should have to decide according to our opinion of the credit due to the respective statements.

Crouse affirms that there had been no dispute between them ; no claim set up by Parke as to damages for infringing the covenant at the end of the articles by which he bound himself to give his interest to Parke, after the four years, and only to do himself such business as he could without the assistance of a partner—that nothing on that head was referred or intended to be, and that besides, there being nothing of that sort, it was illegal and unjust to give, as he says was done, 1000*l.* for prospective damages on a covenant which he might never have violated or chosen to violate.

Parke says, that in 1840, Crouse was in ill health, and unable to attend actively and constantly to his practice (and the partnership articles give evidence of this being so) ; that he, Parke, expected to take the chief labour of the business, as in the event he did, and that he looked forward to his advantage at the end of the time when Crouse would either retire, or at least confine himself to such practice as he might be able to manage himself ; that Crouse's practice in the country was great, and he had much influence, and he, Parke, considered that the hold of business which he would acquire during the four years, through his connection with him, would place him on very advantageous ground, if Crouse would stipulate as a prospective advantage to him, that he, Crouse, would thenceforward confine himself to such practice as he could attend to personally, and as to all beyond that, would do his best to promote his,

Parke's interest; that after the four years were out, Crouse, instead of consulting Parke's interests, did what he could to disparage him in public estimation, and availed himself of the aid of others in carrying on an extensive practice contrary to the spirit of his agreement, and tried to dissuade people from employing Parke; and they got into a dispute about a matter of account not immediately connected with the partnership; that their mutual friends tried to induce them to settle their dispute amicably, and Crouse proposed an arbitration; that he himself would not submit to arbitration, unless Crouse would agree to submit all their co-partnership affairs, and that Crouse at last consented to this, and the bonds were accordingly drawn in their present form.

Crouse replies to this statement that he did agree to submit all their partnership dealings and accounts, so as to strike a final balance between them, but only in that sense and for that purpose, and that he did not agree even to that, except on the express condition which he took care to have inserted in the bond, that in the event of an award being made, the articles themselves were to be cancelled, so that there should be no claim or difficulty thereafter upon them.

Parke's answer again to this is, that he had no objection and did agree that upon the final settlement of all claims and matters between them, growing out of the partnership, the articles should be cancelled, but that he did not by that consent to compromise any claim which he might justly have in the opinion of the arbitrators to a compensation for relieving Crouse from all further observance of the restriction contained in the articles respecting his future practice. He contends that such compensation was a claim fair in itself, and reasonably within the submission, and that it was fairly heard and adjudged upon.

These are the reasonings of the parties. When we look at the terms of the submission, how can we say that a claim for damage for breach of the covenant up to the time of the submission, (if any such could be proved,) would not come within the reference, or that a claim for compensation for being deprived of all benefit which Parke had reason to ex-

pect from Crouse's engagement, never afterwards to take a partner and business and to do all he could to promote Parke's success, would not also come within the reference.

We are to give as large a construction to the instrument of submission as the words of the instrument, and the intention of the parties drawn from their own words, will warrant. Watson on Awards, 8.

The parties both bind themselves by these bonds to keep any award which may be made concerning the partnership and dealings, and all accounts, differences and disputes relative thereto, *and to "matters not connected therewith."*

Any claim that was *relative to the partnership* would come under one head of the submission, and any claim that *had no relation to it* would come under the other head of the submission, as being *another "matter not connected therewith."*

Then there are the usual general words meant to embrace every thing—*of all "actions, claims, damages and demands whatsoever,"* under which words I conceive that any claim which one party can make upon the other for damages which he could have made the ground of an action, he could make the subject of a claim at the arbitration, although he might not before have advanced that claim, and though it had not before been made the ground of any dispute between the parties. And I do not say that such demands only could be awarded upon as could have supported an action at law.

It is true, as Dr. Crouse urges, it has an unreasonable appearance that the arbitrators should award a large sum of money for damages, that might thereafter be sustained by Dr. Parke, under a covenant, in case he, Crouse, should act in violation of it for the rest of his life, when it must be quite clear, as regards all the time yet to come, Dr. Parke could not yet have sustained any such damage, in the nature of things, as the arbitrators were giving compensation for, and possibly never might sustain any, since Dr. Crouse might never choose to take a partner.

It is not unreasonable, as Dr. Parke on the other side urges, to say that this is not the proper light in which to put the matter; that the fair inference from the submission that the

arbitrators were expected and empowered to close finally all occasion of dispute and claims between them by reason of their former connection, and to set both free from all engagements to each other; that it became their duty in doing this, to consider the value to one and the inconvenience to the other of the prospective engagements in the covenant which they were going to cancel, or rather which was to be cancelled as the effect of the final settlement to be made by the award; and to give a fair compensation for whatever was to be surrendered on either side.

All contracts of all kinds previous to the award were, as the submission provides, to be cancelled by the award. Suppose that Parke had then held a note or bond of Crouse's, or a special agreement of any kind—as for instance, to convey land which had been in a great part paid for—the award would bar all claim under such instrument, and it would surely be just that the advantage thus lost should be the subject of compensation, and should be allowed for in the award.

It may be very true, as Dr. Crouse says, that he meant, and that Dr. Parke assented, that on his agreeing to submit to arbitration for a full settlement of all private and partnership dealings, all idea of holding Dr. Crouse further bound by any stipulation in the articles, should be simply abandoned and the articles given up; but the instrument does not import that, and we cannot receive parol evidence to alter or explain it. The question is, does not the submission fairly import this—"the arbitrators shall have power to relieve both parties from all further liability to each other by reason of anything that has taken place between them, and upon such terms as they may think just?" I cannot say that it does not.—5 D. and R., 317.

The calculation on which the arbitrators allowed 1000*l.* as a compensation, may have been extremely fanciful. It seems they thought that Dr. Crouse being relieved from the covenant as to not taking a partner, would certainly take one; that would lighten his labour, and so probably prolong his life to at least ten years; that the difference to Dr. Parke of his sharing the field with him alone or having the help of

a young and active partner in his infirm state, would be at least 100*l.* per annum, and as they seem to have assumed that Dr. Parke would live ten years also, they awarded 1000*l.* as a fit consideration for Dr. Crouse being set free from the restriction.

That may in truth do no more than compensate Dr. Parke. It may not, in the sound opinion of medical men, conversant in such matters, and acquainted with the nature and extent of the practice there, be ridiculous or extravagant; and at all events if it be, then Dr. Crouse has been unfortunate in his selection of an arbitrator. It is to their judgment and not to ours that the reasonableness or unreasonableness of the respective claims have been submitted. We have no right to place our opinion above that of the arbitrators on such a point, and should probably err if we did so. For though it does seem to me to be a large sum which the arbitrators have thought proper to award as a recompense for losing the benefit of the covenant in question, yet I do not feel myself entitled to say that the event might not prove that it is no more than an equivalent for the gain that will ensue to the one and the loss to the other, under the circumstances, which would probably occur. It would certainly, however, have seemed more reasonable not to have made this sum payable so promptly, under the circumstances. But these are considerations which regard the merits, and which upon the principles which govern courts of justice in dealing with awards, do not rest with us.

Of course, if we could see clearly that the awarding any sum whatever as a recompense for losing the advantage of the covenant in question as a continuing restriction, was an excess of the arbitrator's authority, we ought then, without hesitation to set aside the award. But I do not feel clear on that point; on the contrary my impression is otherwise. The case of *Morley v. Newman*, 5 D. & R., 317, shews how liberal a view the courts are inclined to take of the authority of the arbitrators; and when it is considered that it was not only the articles of partnership which were to be held as no longer in force and binding after the making of the award, but also all contracts whatever previous to the award,

I confess I cannot reconcile myself to any other view of the matter than that the arbitrators were to have power to consider what was to be given up on either side, and of course what balance it would be just to strike in consequence, in order to abolish all outstanding grounds of claim between these two parties, and to reduce everything, for the sake of peace, to the plain and certain form of a final award between them.

Proceeding on that principle, the award could be justly substituted for all grounds of claim, past and future, in respect of everything done or that might be claimed under every instrument that had been executed between them; but if all obligations were to be cancelled, without regard to what either might gain or lose in consequence, then the effect of the award might be most unequal and unjust.

It is reasonable, I think, to regard the parties as submitting in this spirit—namely, Crouse proposes to Parke to leave the particular disputes in which they had become actually involved to arbitration. Parke answers: “not unless you will leave all our partnership affairs, which are yet unsettled, as well as those matters about which we are litigating.” Crouse replies: “I will do that, provided, however, that the award shall leave nothing unsettled between us, nothing open which can furnish occasion of future quarrels. If you will agree that the award shall put an end to all covenants, contracts, engagements, and restrictions between us, then I will submit everything.” Parke, when he agreed to that, could surely not mean to agree to it on any other understanding than that the arbitrators might make an award which should have the effect of thus finally annulling every existing contract and liability between them, upon such terms as they should think just. That is, taking into consideration what was to be cancelled and given up on either side, and striking the balance accordingly.

I take the submission as it is worded, to have that effect, and do not feel authorized to deny the arbitrators that scope. But I admit, when I say this, that I do not feel certain that Dr. Crouse may not be quite right in declaring that it was in fact perfectly understood between him and Parke,

that in case he should agree to throw open all accounts and past transactions to arbitration, he should be relieved from the future effect of the restriction in question, and without paying any consideration on that account.

But while this is asserted on one side, it is strenuously denied on the other; and on the written submission, which is what we must look to, I cannot say that the arbitrators have exceeded their authority. If that was really meant, which Dr. Crouse asserts, then the submission bonds, when they state that after the award made the articles of copartnership and all other contracts previous to the award shall be null and void, should have added something expressly to the effect that no claim for compensation should arise to either party, in consequence of the annulling of such articles or contracts; a provision which if it might be reasonable as regarded the articles of partnership, would certainly have had a very absurd appearance, as applied to contracts of every other kind. Yet they would have stood all upon the same footing if they had, without distinction, been made subject to such a provision; and now that no such provision has been made, as to the consequences of annulling any of them, they are left in fact to stand all on the same footing; and reason, I think, seems to demand such a construction of the instrument as admits of allowances being made in respect to any contract which the award, when made, must have the effect of annulling.

It would have been a more just and obvious course for the arbitrators to have taken, if they had afforded to Crouse an option to have renounced all liberty to interfere with Parke's practice, to any greater extent than by continuing his own mere personal attendance on patients without availing himself of the services of a partner, or to have bound himself to pay Parke a certain sum in case he should choose to take a partner. Instead of that, they have assumed that Crouse will certainly exercise a privilege which he may really have no desire to exercise, and that he and Parke will both live so long as to make the damage to Parke amount to a certain sum. I have considered whether, acting in accordance with the spirit of the suggestion thrown out by

Bayley, J., in *Morley v. Newland*, 5 D. & R., 317, we could not in disposing of this rule afford that option, by resolving to make the rule absolute to set aside the award, provided Crouse shall, within a certain time execute and deliver a covenant to Parke not to take a partner, and unless Parke shall accept of such covenant instead of the damages awarded, as it is said on that head of claim. But there are difficulties in the way of that course; the award simply directs one gross sum of 1300*l.* to be paid; it does not distinguish how much of that was for past transactions and liabilities, and what portion, if any, in recompense for being deprived of the covenant in question. And then the stipulation in question went further, and provided that Crouse should promote Parke's interests and not give his interest to any other practitioner, and we should be counteracting the very object of the reference if we were to leave open these occasions of future litigation between them.

On the whole, if it were merely doubtful whether the construction of the submission bond for which Dr. Crouse contends, be the legal construction or not, we ought not to settle that point in a summary manner upon an application to set aside the award; that should only be done on such a ground, when the point is perfectly clear, especially when the sum awarded is large, as in this case; for if the submission did really not give authority to the arbitrators to award compensation in respect to the covenant to be cancelled by the award, then the award and submission taken together would shew the award bad. The defence would be a strictly legal defence, which would be set up by plea, and then it would be upon record and decided in the most formal manner, with the advantage of appeal.

As to the grounds which impute partiality and mal-practice to the arbitrators, in consulting counsel through the instrumentality of Parke or his agent and in concert with him only, without affording to Crouse, or even to all the arbitrators, a full opportunity of participating equally in whatever was done in that respect; those clearly are grounds on which this court should be scrupulous in affording their protection, if any complaint of that nature appeared to be well

supported ; but it has not seemed to me after carefully examining the very voluminous statements and explanations on these points, that there is anything made out which we should be warranted as taking as a ground for setting aside the award. The affidavits filed in answer, I think, relieve the case from suspicion in that respect.

MACAULAY, J.—I cannot say, I am satisfied with the justice of this award. Indeed, so strongly am I impressed with its unreasonable excessiveness, that I would set it aside, so far as relates to the 1300*l.*, if authorized to do so on any view of the authorities. But this cannot be done, consistently with the authorities, without imputing corruption or misconduct to the arbitrators, however much I doubt the soundness of their judgment and discretion.

It was for them to consider the evidence, and it certainly warrants the large amount awarded to Parke ; and although the arbitrators may have proceeded on vague evidence, or erred in soundness of judgment and discrimination, I cannot set aside their decision as corrupt—the imputations of which are strongly repelled.

DRAPER, J.—I have been through a long consideration of this case, struggling against the weight of authorities which regulate the authority of the court in interfering with awards, and have reluctantly come to the conclusion, that this is not a case in which I can on legal principle say we should be warranted in interfering.

I cannot say the arbitrators have exceeded their authority, neither can I find in the matter before the court any evidence of corruption in fact—nor sufficient evidence of what I would, by way of distinction, call legal corruption. I cannot assume to know that their decision is based on false premises or erroneous reasoning from them, though I do feel most strongly that I should not, on the facts placed before them for adjudication, have arrived at the same result.

Per Cur.—Rule discharged.

KEEGAN V. ROBSON.

Evidence under the plea of not guilty, in an action of slander.

The plea of not guilty, in an action of slander, operates as it did before the new rules, not merely in denial of speaking the words, but of speaking them maliciously, in order to defame. All the circumstances, therefore, immediately preceeding and attending the speaking of the words, may be given in evidence by the defendant under such plea.

Slander : Plea—"Not guilty," by statute.

The declaration averred that before the speaking of the words, the mail of Our Lady the Queen, containing letters of great value, was lost between Kaysville and Preston, in the District of Wellington, and the defendant maliciously intending to injure the plaintiff in his good name and to cause it to be believed that he was guilty of felony, in a discourse which he had with the plaintiff, of and concerning the plaintiffs, and of and concerning the said loss of the mail, in the presence and hearing of divers worthy subjects, falsely and maliciously spoke the malicious words following :—"You, Keegan, and no other person, robbed the mail."

In a second count the words charged were, "John Keegan, and no other person, robbed the mail."

The evidence proved that the mail from Goderich down had been lost, in the evening of the 19th of April, and early on the morning of the 20th, it was reported, and generally believed that it had been stolen.

The defendant was a magistrate, and one of his sons was contractor for the mail. Suspicions fell upon the plaintiff, and the defendant's son expressed suspicion of him to the defendant, and the defendant told the postmaster that it was the plaintiff, or that he thought it was the plaintiff.

Everybody in the village was excited about it, for it was known that there was a good deal of money in the mail.

Many houses and persons in the village were searched, and all seemed ready and willing to submit to this, and were anxious to discover the person guilty. It was in the midst of this excitement, that the defendant, the only magistrate present, said to the postmaster the words charged in the second count.

The defendant maintained, that the words should be treated as privileged, from the circumstances and not maliciously spoken—if the jury believed that the defendant spoke them sincerely, in consequence of the rumour, and in the moment of anxiety to detect the offender, and with no view maliciously to defame.

The learned judge ruled, that it was necessary that any circumstances justifying suspicion should have been pleaded and would only admit it to operate in mitigation of damages if the defendant being a magistrate, and present during the search, while there was a general anxiety and endeavour to discover the mail and detect the offender, spoke the words charged to the postmaster, as his own real opinion of what had become of the mail.

It was contended for the defendant, that whether the words were spoken maliciously and with intent to defame, was always a matter open to question on the general issue, and that it might have been left to the jury, upon evidence given, to acquit the defendant if they should believe that he acted sincerely and in good faith, with a view only to direct suspicion to the right quarter, and from no motive of maliciously injuring the plaintiff.

There was slight evidence of previous ill will on the part of the defendant towards the plaintiff.

The jury found for the plaintiff 25*l.* damages.

Freeman obtained a rule for a new trial, on the ground that the verdict was contrary to evidence and for the rejection of proper evidence. *Crooks* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Upon considering the evidence in this case, we think there ought to be a new trial, for the learned judge seems to have been under the impression that the evidence which the defendant offered to give, could only have the effect of mitigating damages, and could not entitle the defendant to a verdict, and that if offered with that view, the facts should have been specially pleaded. But we consider that the plea of not guilty in slander, operates precisely as it did before the new rules, not merely in denial of speaking the words, but of speaking them maliciously, in order to defame;

Smith v. Thomas, 4 Dowl., 334; Padman v. Lawrence, 11 Ad. & Ell., 380; and that the defendant should have been allowed to give evidence of all the circumstances immediately preceding and attending the speaking of the words, which would have enabled the jury to judge whether the words were uttered as the sincere declaration of a suspicion really entertained and upon probable ground, and uttered at a moment when the defendant, as a magistrate, and others, were earnestly consulting and endeavouring, for the public good, to detect the author of a supposed robbery of the mail.

Per Cur.—Rule absolute for a new trial.

M'CUNIFFE V. ALLEN ET AL.

Endorser's liability to holder, under a subsequent promise to pay, where due notice of non-payment, though put in issue, cannot be proved.

Upon the issues of non-presentment, and non-payment, the holder of a note will be entitled to recover against the endorser, by proving his subsequent express or implied promise to pay—even though the promise be made after the action brought, and after issue joined.

Assumpsit against Allen as maker and W. Myers as endorser of a promissory note, dated 4th April, 1848, for 25*l.*, payable in three months.

Myers pleaded, 1st.—That the note was not presented to the maker. 2nd. No notice of non-payment. 3rd. A special agreement at the time of making of the note—to which plea plaintiff replied *de injuria*.

The evidence was to this effect: Some days before the trial the plaintiff brought the defendant Myers to the office of plaintiff's attorney, being directed by the attorney to do so, in order to obtain from him such admission of notice of presentment as would enable plaintiff to recover. The attorney there read to the defendant the third plea, which had been put in, setting up an alleged agreement about the note, and the defendant admitted that there was no truth in that defence; he said it was an honest debt, and that he had not directed his attorney to plead such a defence. He added that he was liable on the note, but that he hoped the plaintiff would get it out of Allen if he could; that it was an honest debt and that he should have to pay it if Allen did not. He

admitted his liability for all that remained due on the note, being as he said 22*l.* 10*s.*

It was objected that this evidence did not sustain the plaintiff's case on the first and second pleas.

The learned judge ruled, that if the jury found that Myers promised to pay, or admitted his liability, with a full knowledge of all the circumstances, it would entitle the plaintiff to recover on the first and second issues.

It seemed to be conceded at the trial that notice had not been given, or at least that Myers said so, and that the plaintiff was unable to prove it otherwise than by Myers' admission of his liability.

The jury found a verdict against the defendant on all the issues.

Hagarty obtained a rule for a new trial on the law and evidence, and for misdirection—relying on the insufficiency of the evidence to entitle the plaintiff to a verdict on the pleas denying presentment and notice. *Crooks* shewed cause.

The cases cited on the argument were—16 M. & W. 743; 1 U. C. R. 109; 1 Q. B. R. 39, 814; 1 Car. & Kir. 522; 5 M. & W. 418; Story Pro. Notes, s. 453; Law Mag. No. 80, p. 148; 2 Campb. 105; Chitty on Bills, 436 (note y.); 13 E. R. 417; 12 Jurist, 395; 1 B. & C. 194; 6 E. R. 16 (n); 9 B. & C. 44; 6 M. & G. 10; 3 Q. B. R. 574.

ROBINSON, J. C.—Some stress was laid on the argument of this case, on the manner in which the admission of liability was obtained, and no doubt it was open to remark.

The defendant's counsel did not press his objection at the trial to the extent of contending against the admission of the evidence, nor do I think he could have done so with success. The evidence then went to the jury, I dare say, with remarks from the defendant's counsel strongly tending to weaken its credit with them, and with such observations from the bench as appear proper. The jury gave their verdict from the plaintiff, and as the defendant has not made it a ground of his application for a new trial, that the evidence was improperly allowed to go to the jury, we have only to consider what could legally be its effect, supposing the jury

to have believed it, as they shew they did by the verdict they gave. And indeed we should not be warranted in absolutely inferring that any thing unjust was done or intended by the plaintiff's attorney in obtaining the admission referred to. We cannot tell but that the defendant may in conversation with the plaintiff himself have admitted all that was necessary to sustain the action, which admission, however, the plaintiff himself could not be called to prove. How can we say the plaintiff and defendant may not, after the note became due, have conversed about it, when defendant may have admitted that he was as much bound to pay as the maker of the note, and disclaimed any idea of requiring proof of notice? Nothing would be more natural than for the plaintiff's attorney, when informed of this, to make the plaintiff aware that as he could not be a witness in his own case, it was necessary to ascertain whether the defendant meant to carry his admission candidly through, or whether he might not be reserving an intention to surprise the plaintiff on the trial by setting up a defence which he had before repudiated. The attorney might under such circumstances fairly say to his client, "do you think he will say before a third party what he has said to you? I must know that, bring him to me and let me ascertain whether he really does fully admit his liability."

Nothing is in general more unfair than for the attorney of one party in a suit to entrap the other party into admissions; but though all communications between them should be looked at with jealousy, we cannot decidedly hold them to be in every case improper, still less illegal. The circumstances must in each case be looked at, and the court and jury are to consider them as affecting the credit due to the testimony; that is all we can say in such cases.

Now the jury being told here that if Myers promised to pay, and admitted his liability with a full knowledge of all the circumstances, it would entitle the plaintiff to recover, they have found for the plaintiff 22*l.* 10*s.*, the balance due on the note, and must therefore, be taken to have been satisfied that the evidence did establish what the learned judge

told them was necessary. If the jury had found for the defendant, and we were asked to grant a new trial on the ground that they had no discretion, but were bound to find for the plaintiff, I cannot say that I could have assented to that; but the question before us is a different one, namely, whether the plaintiff so completely failed to make out his claim to the 22*l.* 10*s.* that the verdict for it which he has received must be set aside?

There were here two issues; first, on the fact of presentment; secondly, on the fact of notice to the defendant as endorser. The jury found that, having full knowledge of all the circumstances, Myers promised to pay. This, it is true, was after action brought, and even after issue joined, but that makes no difference, because the admission operates as evidence only of what it would otherwise have been necessary to prove; it is not like a fact occurring after the issue, which would in itself constitute a new ground of action not existing before; it is an admission of a previously existing fact, and like the admission of a previously existing debt, is as good if made after the action as before.

In the case in this court of *Bank B. N. A. v. Ross*, 1 U.C. R., 199, we had occasion to consider the effect of an admission of liability, under such circumstances, when due notice had not been given. I am still of the opinion which I expressed there, after examining fully the decisions in England up to that time, I do not consider that those decisions proceed upon any such assumption as that the jury was convinced by the admission of liability, or the promise to pay, that in fact there had been due presentment and notice. On the contrary, most of the cases contain such statements as shew clearly that the fact was as fully known as it can have been in this case that there was not due presentment and notice. If the verdict ought in each of those cases to have been governed by the conviction of the jury, upon the fact of due notice, then the jury should have been told that if they believed the defendant had not due notice, they must find in his favour, otherwise against him. But the cases there cited, and many more that might have been cited, shew that the courts have always treated the

promise to pay, whether express or implied, as putting an end to all question about the fact of notice.

Sometimes it has been said by the court, or by individual judges, that it precludes the defendant from questioning the fact, or in other words, should be taken as an admission, which he cannot retract at any other time, that it is a waiver of any advantage on the score of want of presentment, not a dispensation relieving a party from the necessity of giving notice, because that could only be when something has been said or done before the note fell due, which in its effect dispensed with notice; and in such cases it is clear the ground of dispensation should be stated in the declaration and presentment, and notice must not be averred. That is not the present case.

I think we can draw no distinction on sound principles between cases where no notice has been given, or no presentment made, and cases where it has not been made or given in time. Evidence of presentment made, or notice given a week or month or six months after the time, can no more support the plaintiff's case than if there had been no notice.

It is true that in this case there are express issues upon pleas denying presentment and notice, but in *Croxon v. Whitehall*, 5 M. & W. 5, it was determined that the new rules which make it necessary to plead the want of presentment, or notice specially, make no difference in regard to the effect of subsequent promise to pay; and that such promise may be held to apply on the express issue, as they used to apply where the facts of presentment and notice were involved in the denial by the general issue. I think we should gladly avail ourselves of the decisions to this effect, for it was never the intention of the new rules to alter the degree of proof required, and thus to increase the difficulty of arriving at the justice of the case by giving rise to new technical questions about evidence.

There appears to be a tendency it is true, in the courts to unsettle this point, which for ages has been well settled—namely, that the endorser's subsequent promise to pay may entitle a plaintiff to recover where due notice is denied and is not proved.

A case of *Donnelly v. Howie* was cited as having been decided in Ireland, in which the court held that they could not give effect to the new promise, unless there was some consideration to support it. I have only seen that case as it has been cited in a note to Mr. Storey's work on promissory notes, section 363. It is certainly inconsistent with the current of decisions on that point ; and though a similar opinion seems to have been expressed in a late case in the courts of exchequer in England, yet these cases are against the principle of very numerous decisions, and are not in my opinion entitled to prevail merely because they are recent cases, when the doctrine formerly held was plain and well established. Mr. Justice Storey considers them as being opposed to the weight of judicial authority both in England, and the United States; and that this is true as regards England, is, I think, undeniable.

The legislature may, of course, place the law on a different footing, if they think it proper to do so ; but we have no authority to change it, by departing at our pleasure from a principle uniformly acted upon for more than a century and a half. It is no positive enactment that has created the very strict rules respecting presentment and the notice to be given to an endorser; they depend on judicial decisions merely; and it seems to me that the holder of the note is entitled to have those judicial decisions, and the principle derived from them, pressed no further against him than is consistent with the decisions themselves; he has the same right to insist upon the established exceptions and relaxations as the endorser has upon the general rule. In other words, I hold myself bound to apply the rule with the relaxation ; the latter being as clearly upheld by authority as the former.

I think the rules which have governed for more than a century, in respect to commercial transactions and securities of this kind, should not be treated as fluctuating and uncertain, when they have so long been certain and fixed. If they are not satisfactory, it is the legislature and not courts of justice that should innovate upon them.

In some of the English cases, the fact of the endorser

having promised to pay after the note was at maturity, has been treated as evidence that he was the person who ought to pay the note, and not a mere surety, and that consequently he had no claim to notice: and it may be said that if that be the principle on which the plaintiff can be allowed to recover, it would constitute a case of dispensation arising from the nature of the transaction, and ought to be pleaded since the new rules; but we must see what that will lead to. All the plaintiff in general knows is, that the endorser has promised to pay; and if he should venture to draw the inference that the note had been made or endorsed for the endorser's benefit, and that he was in fact the real debtor, and should rest his case on that averment in his declaration, he might not only be wholly unable to prove it, but might find it disproved, if issue were taken upon it.

Surely it is an intelligible and convenient and reasonable ground which the courts in so many cases have taken, where they have held, as in *Lundie v. Robertson*, 7 E. R. 235, that the promise of the indorser to pay admits all that may be necessary to charge him, and makes it unnecessary to give evidence of presentment and notice, entitling the plaintiff to recover without adducing such evidence.

I observe, in this case, part of the note has been paid; whether by the maker or endorser, seems not to have been proved.

On the whole I am not in favour of setting aside the verdict. If it should appear hereafter that the courts in England have, upon mature consideration, repudiated what has been hitherto held on this point in so many cases, and by such eminent judges, and have established new principles, which we may assume will be generally adhered to, then it will be proper to consider whether we shall conform to the new law or the old. In the meantime, the verdict which the jury has found in this case is, in my opinion, well supported by the existing state of the law in this province.—See *Chitty on Bills*, 436 (n.) 437, 499, 501 (9th ed.); 13 E. R. 417; 2 Campb. 105; *Peake's C.* 202; *Storey Pro. Notes*, secs. 276, 362; 7 E. R. 231; 6 E. R. 16 (n.); *Buller's N. P.* 276.

MACAULAY, J.—The cases in the books are numerous on the subject of waiver, and the circumstances that (under a plea denying notice) involve the admission thereof, or amount to evidence from which a jury may presume it duly given.

Some of them are previous to, and others since, the new rules of pleading; some are actions between the holders and drawers of bills of exchange, and others between the endorsee and endorsers of bills or notes; some relate to presentment for payment or protest, and others to notice of dishonor; and it is not easy to extract any clear or definite rule from them.

It is to be observed, that in the present case it is in evidence that no notice was in fact given; whence it follows, that the defendant was in law discharged from liability by reason of the plaintiff's laches; that the defendant pleaded a denial of notice, whereby the burthen of proof was on the plaintiff, and that the conversation relied on to support the averment of notice in the declaration took place afterwards and shortly before the trial; (3 Q. B. 574); that the defendant was invited to the office of the plaintiff's attorney, on purpose to obtain his admission; and that in a conversation not directly involving the question whether he had received notice, or was willing to waive it and acknowledge the debt, notwithstanding its omission, but indirectly doing so, he admitted liability, saying it was an honest debt but requesting every effort to be made to obtain payment from the maker.

In the last edition of Byles on Bills, p. 223, it is said, the consequence of neglect of notice will be waived by a subsequent promise to pay, and payment of part or an acknowledgement of liability; though after action brought—15 East 275, *Hopley v. Dufresne*—will be *evidence* of notice, referring to the various cases, and remarking that many of them failed in drawing the distinction between the use of a promise as a *waiver* of notice, and its use as *evidence* of notice.

Id. 224: that it seems in some recent cases to have been considered that a promise to pay, was only evidence from which a jury might presume that notice had been

received, referring to 4 Bing. N. S. 229, Hicks v. Beaufort, and other cases.

Ib., 225 : And the writer considered that as prior dispensation must be specially alleged in the declaration, so a subsequent promise, when used as a *waiver* of notice, should be specially pleaded, although when used as an *evidence* of the fact of notice it need not.—5 M. & W. 418.

That a promise to pay, or part payment, or the offer of it, were *prima facie* evidence of notice ; but though there be no evidence to repel the inference, the jury were not bound to draw it.—Bell v. Franks, 4 M. & G. 446 ; 5 Scott, N. R. 460, S. C.

Ib., 319, 320 : That a promise to pay is admissible under the common averments as *prima facie* evidence ; that the preliminaries essential to the maintenance of the action, such as presentment and notice, have been satisfied ; but if it should distinctly appear in evidence, that there has been a neglect to present, and that the defendant being aware of the omission, afterwards promised to pay, so that the promise is used as a waiver, it is conceived that the declaration must be special. It may be otherwise when there has been a neglect to give notice of dishonor, and a promise to pay, with notice of the omission, has been made *before* action brought ; for then the defendant has in the words of the declaration, had notice of the dishonor, which notice, under the circumstances, may be deemed, as against him, due notice. But the law on this subject does not appear to be very clearly settled.—3 B. & A. 624 ; 3 Q. B. 574.

I would also refer to Storey on Promissory Notes, section 358 and the following sections ; and Storey on Bills, sec. 320, in the notes to which an extract is given from the last edition of Chitty on Bills, on this subject—see Chitty on Bills, 23^d, 7th edition, referring to a case decided in the Exchequer in Ireland, in 1833, in which that court, citing Standager v. Creighton, 5 C. & P. 437, held, that a promise to pay, after being discharged by laches of the holders, was *nudum pactum*, and not a waiver of notice, &c.—Chapman v. Bennett Coram, 1 C. & K. 552 ; Pullock, C. B.

Now, although I am not prepared to say that the cases do

not warrant the conclusion that the facts in this case constituted evidence on which the jury were at liberty to find the issue in favour of the plaintiff, viz., that he had given the defendant due notice of presentment and non-payment, on the ground that a promise to pay, or an admission of liability amounting to a promise to pay, or evidence thereof, involves the concession that notice was received or taken of the non-payment—in short, that the defendant had knowledge thereof, which he accepted as sufficient notice *pro hac vice*; still, I think the tendency of the cases since the new rules is, to treat such admission or promises at the most as only presumptive evidence for the jury, when the want of any notice does not distinctly appear; and that when it is clear no notice has been given, a subsequent promise or acknowledgement should be relied on, not to support the averment of the notice, but an averment of the waiver of due notice, if such an allegation would not vitiate the declaration as shewing laches, discharging the defendant and rendering the subsequent promise invalid as wanting consideration—a construction I should not myself be disposed to place upon it.

The inconsistency of the argument, as applied to this case, is, that on presumptive evidence of notice, the jury, it being left to them, have found such notice in opposition to the fact that there was no notice, making the presumption stronger than the absolute fact. One presumption may repel or neutralize another, but presumptive evidence never can outweigh positive proof to the contrary.—5 Taunt, 352.

The only tenable footing on which to place it seems to be, that the defendant is estopped from shewing the truth, or that his conduct, being inconsistent with the absence of notice, evinced a knowledge of the facts, and an acquiescence tantamount to due notice. I, however, fully expect to find that future cases will place the matter on the true ground, and one consistent with reason and legal principles.

In the present case, however, there was not a promise to pay, nor a distinct admission of liability equivalent thereto, or to a waiver of the plea of want of notice; and on the face of the evidence it appears to me, that it may well be

said, nearly in the words of the Lord Chief Baron, in Chapman v. Annett: the admission of liability does not necessarily admit the notice, although it may waive it—that although the defendant's conversation did amount to an admission of liability, there was no notice; and it is for the court to say what is, under the circumstances, the legal effect of the subsequent admission.—2 C. B. 258; 12 Jurist, 395; 16 Law Jl. C. P. 249; 4 Bing. N. S. 229; 1 Q. B. 814; Law Times, May, 1849.

It appears to me, an undue advantage is sought to be taken of the defendant in the absence of his attorney, and that such evidence, so obtained at such a time, ought not to be suffered to prevail or to establish due notice, contrary to the admitted fact.

If there is any doubt upon the question, whether in point of fact notice was or was not given, there should be a new trial.

On the evidence, I infer that the plaintiff's attorney, on his examination, admitted that no notice had been given.

When I speak of evidence of waiver of notice, as distinguished from presumptive evidence of notice, I do not mean evidence of circumstances arising before the note became due, excusing the giving notice by previous dispensation, but a waiver of the default after it had been committed, by subsequent promises to pay or admissions of liability, &c., admitting the liability to subsist and continue, notwithstanding the laches.

DRAPER, J., concurred in opinion with the Chief Justice.

Per Cur.—Rule discharged.

MACAULAY, J., *dissentiente*.

THOMPSON V. FARR.

Proceedings under the act by the creditor of an absconding debtor against his debtor—what averments necessary in the declaration. *Quære* as to the defence upon a note being good, where it does not go to an entire failure of consideration on the note.

The creditor can only have a verdict for so much of the debt due to the absconding debtor as will cover his own debt against the absconding debtor.

The declaration commenced thus: "David Thompson, who sues under the provisions of the acts of the parliament of Upper Canada for attaching the property of absconding

debtors, in order to recover from William Farr, debtor to one John Williams, an absconding or concealed debtor, such sum as the said William Farr may owe to the said John Williams or so much thereof as will discharge the sum of 50*l.* 19*s.* 3*d.*, being the amount due by the said John Williams to him the said David Thompson, by R. M., his attorney, complains of the said William Farr, and demands of him the sum of 140*l.*, for that whereas, &c."

The declaration then sets out that Williams, being indebted to the plaintiff Thompson in 28*l.* 8*s.* 9*d.*, upon the application and at the suit of the plaintiff in respect of such debt, viz., on the 6th June, 1846, a warrant for the attachment of the property of the said Williams, as an absconding debtor, was duly issued out of the District Court of the district of Niagara, under the seal, &c., directed to the sheriff of the said district, setting out the writ and indorsement and delivery to the sheriff, his notice in the gazette that he had seized and taken all the estate, real and personal of the said Williams, and the continuance of that notice, as required by law: that Williams, not having appeared and given bonds, &c., the plaintiff sued out a *ca. re.* 15th October, 1846, before the commencement of this suit, out of the said District Court, against Williams, to recover the debt for which the attachment was issued.

The declaration then set out judgment recovered on the 31st of December, 1846, by plaintiff, against Williams, for 45*l.* 2*s.* and *fi. fa.* issued thereon, returnable 8th March, 1847—the delivery to the sheriff and his return of *nulla bona*. It then averred, that at the commencement of this suit Williams had not any goods or chattels, lands or tenements, within the jurisdiction of the district court, out of which could be made the amount of the said judgment, or any part thereof, and that the said debt still remained due to the plaintiff; and proceeded to state, that before the issuing of the attachment, and long before the commencement of this suit—viz., 29th April, 1846—the defendant in this suit, William Farr, made his promissory note to Williams or order, payable 1st July then next, for 124*l.*, with interest, which, with interest, amounted to the 140*l.* demanded in

this action, and that the sum was still unpaid; that Farr had due notice of the attachment, and of the judgment recovered by the plaintiff against Williams, and of the *fi. fa.* thereon, and return; and that from the issuing of the attachment to the commencement of this suit, he has resided in the district of Niagara; whereby and by force of the statute in that behalf, an action has accrued to the plaintiff to demand and have from the defendant 140*l.*; yet the defendant has not paid, though often requested, to the plaintiff, or to any one else, the said 125*l.* in the said promissory note mentioned, or any part thereof, or any interest thereupon, to the plaintiff's damage of 50*l.*

The defendant pleaded, first, that the note was obtained by Williams from him, the defendant, by fraud, covin and misrepresentation.

Secondly, That Williams gave him no consideration for the note.

Thirdly, He pleaded, in substance, that before making this note, it was agreed between him and Williams, that Williams should sell him certain lands, and convey them to him, or to any person whom he should appoint, free from incumbrance: that he was to pay for the lands 100*l.* down; to give his note, payable in six days, for 25*l.*; to pay one Lee, for Williams, 50*l.*; to give his note, payable to Williams on the 1st July, 1846, for 125*l.*, which was the note sued on; and another note for 75*l.*, payable in three years: that Williams conveyed the land to one Catharine Beven, by his direction; but that instead of being free from incumbrance it had been mortgaged in 1845 to one Meredith for 200*l.*, which was yet unpaid: that he had no notice of this incumbrance until after he had paid the 100*l.*, the 25*l.*, and 50*l.*, when he discovered it, and then demanded back this note for 25*l.*, and that for 75*l.*, and insisted on repudiating his contract, but that Williams refused, and the mortgage was still unpaid: and he concluded by averring that "so the said note was obtained by Williams from him, without any consideration for making the same; and he alleges that this plaintiff had notice of these facts before commencing this suit."

Fourthly, That after the suing out the attachment, and before the commencement of this suit, Williams had goods out of which the plaintiff's debt could have been made.

Fifthly, The defendant pleaded the same facts as in the third plea, concluding, "and so the defendant saith that the said note was obtained from the defendant, and is now held by the plaintiff, by means of the fraud, covin and misrepresentation of the said John Williams.

The plaintiff replied *de injuria* to the special pleas.

On the trial, the learned judge expressed an opinion, that the special pleas did not disclose a legal defence, and the defendant submitted to have a verdict pass against him, on the understanding that a new trial might be granted, if the court should be of opinion that the defendant, on proving his pleas, should have succeeded at the trial.

The defendant moved also in arrest of judgment, and objected to the declaration as insufficient.

Hagarty obtained the rule *nisi*, mentioned above. *Cameron*, Q. C., shewed cause.

The following cases were cited on the argument:—2 C. M. & R. 103 ; 1 Ves., sen., 95 ; 1 Camp. 640 ; Dougl. 654 ; 6 M. & W. 278 ; 1 Stark, c. 51 ; 8 Dowl. 174.

ROBINSON, C. J., delivered the judgment of the court.

We think the declaration disclosed as much as is necessary to entitle the plaintiff to sue the absconding debtor ; and it follows the statute, in giving, by way of introduction to the action, all the explanation which the statute makes necessary.

We should have no authority for exacting more, and in doing so we should be contravening the statute ; but the declaration is clearly wrong in claiming for this plaintiff more than the amount due to him by the absconding debtor ; and the jury should not have given, as they have done, the full amount of the note and interest ; for this plaintiff could only be entitled to judgment for so much of it as would cover his debt against Williams.

We think there should, on this account, be a new trial, without costs, with liberty to the plaintiff, as he desires it, to amend his pleadings.

It is not our impression, at present that the pleas constituted a legal defence: but upon another trial, if they are allowed to remain on the record in their present shape, and the jury should find them proved, it may be made a question whether they bar the action. At present we incline to think, that as the defence does not go to an entire failure of consideration for this particular note—as the pleas shew that Farr, having bought the property, has sold it, as if his note had been good, he must pay the purchase money, and take recourse upon his covenants against Williams.

Per Cur.—Rule absolute for a new trial.

DOUGALL V. REAFISCH.

In declaring upon a promissory note the name of the payee was set forth as John J. Shaver—*Held per Cur.* upon demurrer for not setting forth at full length the second christian name, declaration good.

[*Per Rep.*—The court, last term, (November 1849,) in two cases, adhered to the decision they came to as laid down in the last paragraph of this judgment.

Declaration.—Endorser against maker of a promissory note, alleging that defendant made his promissory note, and thereby promised to pay to John J. Shaver or bearer, and that the said John J. Shaver, &c., to plaintiff.

Demurrer.—Because the name of the payee was not set forth at full length, but was contracted and designated by the initial letter of one of the christian names.

The cases cited on the argument were: 16 Law Jour.; 71 Exch.; 17 Law Jour. C. P. 91; 10 Jurist, 980; 12 Jurist, 985; 13 Jurist, 38 C. P.; 3 Bing., N. C. 777; 14 M. & W., 154; 15 M. & W., 277; 5 A. C. R., 555.

ROBINSON, C. J., delivered the judgment of the court.

Several of the cases cited in support of this demurrer have no application, the alleged defects being different, or occurring under different circumstances.

In Appelmans v. Blanche, 14 M. & W. 154, for instance, the acceptor had no christian name whatever given to him but merely a surname with a blank before it.

In Esdaile v. McLean, 15 M. & W., 277, the bill was stated to have been drawn on one W. Watson, giving him no one perfect christian name.

Here the declaration states that the defendant made a note, payable to John J. Shaver or bearer. In the latest English decision we have a demurrer for a frivolous cause of this kind. *Lomax v. Landelly*, 13 Jurist, 18 C. P., a party, who was described in the declaration as having been once holder of the bill, was called J. Shakespear Williams; and the court refused to give effect to a special demurrer taken as an exception that he was imperfectly described. In order to avoid giving way to the exception, and being pressed by former decisions, they resorted to subtle distinctions between vowels and consonants, which seemed hardly creditable to a court of justice. It would have been better ground, I think, to have taken, that though a man must be supposed to have one perfect christian name, there is no legal necessity for supposing that he had two christian names; and we do know in fact that in many instances a second letter is taken by way of distinction from another of the same name, for convenience sake, and that it is not always the first letter of a second christian name.

In *Lindsay v. Wells*, 3 Bing., N. C. 777, it was stated that in England, that is some times the case and the custom prevails, I think, more extensively in America. What right have we then to hold upon demurrer that a pleading is bad which does not set out two full christian names, when for all we can tell, the person spoken of may not have had two christian names?

In *Playter v. Turner*, which was determined lately in this court, 5 U. C. R., 555, we reluctantly acceded to such an objection, or rather treated it as probably a good objection. It was unnecessary to rest the decision upon it, for there was another exception, which we held fatal to the demurrer; and at any rate that case was stronger than this, for there there was no christian name, but only two initial letters, and one of them a consonant, and therefore out of the pale of the late English decision, which draws the distinction between vowels and consonants.

The case now before us is stronger than that of *Lomax v. Landelly*, because there the initial was the first mark or name, whereas in this case it is the second, and when a

letter is taken as an addition to a christian name, it is commonly added to it, and not prefixed ; but for the sake of suitors, we ought to settle this matter on some more intelligible and satisfactory footing. I think the fair effect to be given to our statute 7 W. IV. c. 3, sec. 9, might have been held to be, that where a plaintiff stated, as in this case, that the defendant made a note by which he promised to pay, for instance, John J. Shaver, we should treat that allegation as descriptive of the writing, and assume that the note ran in the same way, without more being said, though certainly the courts in England have not given that effect to a similar provision. All that is of consequence is, that a rule should be laid down and consistently followed.

My brothers concur with me in making use of this occasion of determining that hereafter, in any case where one christian name is given in full, with a capital letter before or after it, besides the surname, we shall not assume that the party so described had anything more of a second name than is given to him, and this without any nice distinction between vowels and consonants.

Per Cur.—Judgment for the plaintiff on demurrer.

BROWN ET AL. V WHEELER.

Pleadings in assumpsit on a note.

The plaintiffs sued the defendant as maker of a note payable to themselves ; the defendant pleaded that he made the note for the accommodation of the plaintiffs, and that there was never any value or consideration given to him for it ; the plaintiffs replied that there was a good consideration for the making of the note, to wit, to the amount thereof, and concluded to the country, without noticing the averment in the plea, that the note was an accommodation note ; and for this cause the defendant demurred specially—*Held per Cur.*—replication bad.

The plaintiffs sued the defendant as maker of a note payable to them, the plaintiffs.

The defendant pleaded that he made the note for the accommodation of the plaintiffs, and that there was never any value or consideration given to him for it.

The plaintiffs replied that there was a good consideration for the making of the note, to wit, to the amount thereof, and concluded to the country, without noticing the aver-

ment in the plea, that the note was an accommodation note ; and for this cause the defendant demurred,

Freeman for the demurrer. *Vankoughnet* contra.

The cases cited on the argument were—2 U. C. R. 419 ; 12 M. & W. 705 ; 1 C. M. & R. 806 ; 1 M. & W. 426 ; 1 Bing. N. C. 469.

ROBINSON, C. J., delivered the judgment of the court.

This is an informal answer to the plea, as we determined in *Gilmour v. Edwards*, 2 U. C. R. 419. The case of *King v. Phillips*, 12 M. & W. 705, is not at variance with that decision, but confirms it, for the court there only held that an issue so joined would be held insufficient after verdict, but admit that it was an informal traverse of the plea ; in other words, bad on special demurrer

Per Cur.—Judgment for defendant on demurrer.

SIFTON V. McCABE, PIERCE AND SULLIVAN.

The court will not carry into effect an undertaking between the parties, that one of several defendants, who has not pleaded, shall be considered as having pleaded, and as standing on the record in the same position as the other defendants.

The statute 5 Will. IV. ch. 1, does not apply to parties signing notes as joint makers.

The plaintiff, proceeding upon a note against several defendants as joint contractors, chargeable on the same contract and in the same capacity, must prove a case against *all* of them.

The promise to pay by one of several joint and several makers of a note, will take the case out of the Statute of Limitations.

Declaration upon a note, whereby defendants and one Graves jointly and severally promised to pay, &c.

Plea.—Statute of Limitations, and other pleas and issues upon all.

The defendant Pierce, not having been served with a writ, had not pleaded ; but it was consented that he should be considered as having pleaded the same pleas as the other defendants, and in all respects should be in the same position at the trial, and afterwards, for the judgment of the court.

At the trial, the handwriting of two only of the defendants was proved, the other defendant's and Asa Grave's

writing not being proved. A promise from *one* or *two* of the defendants within six years, was proved, but not from others.

Mr. Becher, for the defendants, moved for a nonsuit, on the grounds that this action, being in assumpsit, the plaintiffs must recover against *all or none* of the defendants; and that, as to one or two of the defendants, the plaintiff failed in proof as to making the notes, and any promise within six years.

The learned judge suggested, and by consent a verdict was taken for the defendants, with leave for plaintiff to move to enter verdict for him, if the court were of opinion that he was entitled to recover against all or any of the defendants. Pierce to be considered as having pleaded the same pleas as other defendants.

Hagarty for the plaintiff. *Becher* for the defendants.

The cases cited were—1 Esp. 133; 1 E. R. 48; 2 Stark. Ev. 669.

ROBINSON, C. J., delivered the judgment of the court.

We cannot carry into effect any such understanding, as that one of these defendants (Pierce) who has not pleaded, shall be considered to have pleaded, and to stand on the record in the same position as the other defendants. The record must be consistent.

Upon the point taken, we have no doubt that this is not a case coming under our statute 5 Will. IV. ch. 1, because here all the parties are charged as joint makers, and are rightly joined in one action without the aid of that statute, which consequently does not in any way affect the application of the evidence to this record.

The plaintiff then, proceeding against Graves, McCabe and Sullivan, as joint contractors, all chargeable in the same contract and in the same capacity, was bound to prove a case against all of them, and failed to do so against Graves. There must therefore be a verdict entered for the defendants, unless the plaintiff desires a new trial on payment of costs; and if that is open to us to order, consistently with the understanding of the parties.—1 E. R. 48; 1 Esp. C. 135.

As to the other question raised at the trial, I apprehend

the promise to pay, by one of the several joint and several makers of a promissory note, will take the case out of the Statute of Limitations.—2 Stark Ev. 669.

Per Cur.—Postea to defendants.

HAYES V. DAVIS.

The maker of a note, absolute in its terms to pay the whole amount at maturity, will not be allowed to set up the defence of an *alleged parol agreement* on the part of the holder to renew the note upon being paid half the amount.

Declaration.—Indorsee against maker of a note.

Plea.—Setting up a verbal agreement between the plaintiff and defendant to renew the note upon being paid half the amount.

Demurrer.—Because the alleged agreement varied the terms and tenor of the said note, and was not shewn to have been in writing.

Leith for the demurrer. *G. Duggan* contra.

The cases cited were—4 M. & G. 467; 3 Campb. 57; 3 Dowl. 461; 9 C. & P. 191; 1 M. & W. 174.

ROBINSON, C. J., delivered the judgment of the court.

It was not attempted to support the plea, and judgment is given for the plaintiff. *Hoare et al. v. Graham*, 3 Campb. 57, is in point.

The note imports a promise to pay the whole sum on a certain day; and the defendant cannot be allowed to allege that, before the note was made, or at the time it was made, there was an understanding between the parties that the contract was to be in fact different from that stated in the note.

Per Cur.—Judgment for the plaintiff on demurrer.

GAMBLE ET AL. V. REES.

A. makes a conveyance to B., covenanting that, “at the time of making the conveyance, he was lawfully seized of a perfect and absolute estate of inheritance, in fee simple.” B. afterwards conveys to C., reciting “that he was then possessed in his own right of the land in question.” *Held per Cur.*, in an action brought by C., the assignee of B., against A., upon his covenant for good title—that C. was not estopped by B.’s recital.

Held, also that the usual covenant for good title, is a covenant running with the land, and that it is no objection, therefore, to an action upon such a covenant by the assignee of the covenantee against the

original covenantor, that because according to the statement in the declaration, "the grantor was not seized in fee when he gave his covenant," the covenant was broken as soon as made, and could not enure to the benefit of the assignee.

Quære? What would the effect be, if, at the time the original covenantor's deed was given, a third party had been actually in adverse possession, or if the covenantee had been evicted before he made the deed to the assignee.

Upon an action of covenant for title by an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed. His cause of action is, that he has not the interest which he supposed he was acquiring, and which he would have had if the title of the covenantor who executed the first deed had been good. It is superfluous in any deed of bargain and sale, to express that the land is to be held "*to the use*" of the bargainee—there can be no other limitation of the use, than to the bargainee—the omission therefore of these words can have no effect in transferring the legal title to some person other than the bargainee.

Vide the concluding part of this judgment as to the distinction between a "trust" and a "use."

In covenant for good title brought by the assignee against the original covenantor, it is no objection to the declaration, that it does not shew that the covenantor or assignee may not have been seized of a good estate in the land *at the time of action brought*.

William Rees, by indenture of bargain and sale, made the 6th February, 1837, conveyed to Miss Georgina Huson, with other lands, the south half of lot No. 19, in the 4th concession of Mariposa, and covenanted "that at the time of sealing and delivering the said indenture, he was rightfully and lawfully seized of a good, perfect and indefeasible estate of inheritance, in fee simple, of and in the lands in the said indenture mentioned," &c.

On the 18th of July, 1842, Georgina Huson being about to contract marriage with Samuel Betherton Harman, Esq., an indenture was executed between herself of the first part, the said Harman of the second part, and the now plaintiffs, Clarke Gamble, Davidson Munro Murray, and D'Arcy Edward Boulton, Esq.'s, of the third part, in which the intended marriage is recited, and that Georgina Huson was then possessed in her own right of certain real and personal property, and, among other real estates, was possessed of the said south half of lot No. 19, in the 4th concession of Mariposa, and that it was agreed and intended that the said estates and property, real and personal, should be fully and absolutely conveyed and transferred to and invested in the parties of the third part, the now plaintiffs, upon the trusts and for the intents and purposes declared in the said inden-

ture. And by this indenture the said Georgina Huson, in pursuance of the agreement and in contemplation of the intended marriage, and in consideration of ten shillings of lawful money, &c., by the said trustees, the now plaintiffs, in hand paid to her, did grant, bargain, sell, assign, transfer and set over, unto the said parties of the third part, the now plaintiffs, all the lands and tenements in the said indenture described (including the south half of lot No. 19, in the 4th concession of Mariposa) "*to have and to hold* the said lands and tenements, &c., unto the said Clarke Gamble, Davidson Munro Murray, and D'Arcy Edward Boulton, their heirs and assigns, to and for the several uses and upon the trusts, for the intents and purposes, and with, under and subject to, the several powers, provisoes, declarations and agreements, in the said indenture expressed and declared of and concerning the same."

These trusts were, that a certain portion of the moneys to come into the hands of the trustees under the deed should be held by them, subject to the order and application of the said Georgia Huson; and the income arising from the other property, real and personal, to be paid to the said Georgia Huson during the joint lives of herself and her said intended husband, with provision in case of her husband surviving, and for the benefit of children to be born of the marriage, &c.

This action of covenant was brought by the trustees against Rees, the grantor, in the first mentioned deed; and the declaration, after setting out the two indentures in substance, averred that by virtue of the last mentioned indenture the plaintiffs became seised in fee of and in all *the said* parcels of land of which the defendant was at the time of executing the first mentioned indenture, seised in fee, and became and were possessed of the first mentioned indenture, and entitled to the benefit of the covenant of the defendant therein contained. And it charged, as a breach of the covenant, that "the defendant was not, at the time of the ensealing and delivery of the first mentioned indenture, or at any time before or since, seised of a good, sure, perfect absolute and indefeasible estate of inheritance, in fee simple, of and in the south half of lot No. 19, in the 4th concession of Mari-

posa ; but that, on the contrary thereof, one J. T. W. was long before, and at the time of the ensembling and delivery of the said first mentioned indenture, seised of an absolute estate of inheritance in fee simple of and in the said land, by means of which said premises the plaintiffs have lost and been deprived of the said parcel of land, &c., and have lost and been deprived of the rents, issues and profits thereof, contrary to the tenor and effect of the first mentioned indenture, and of the defendant's covenant in that behalf made ; concluding with the usual averment, that so the defendant had not kept his said covenant, but hath broken the same, to the plaintiffs' damage of 500*l*.

The defendant cravedoyer of both indentures ; and having set them out, demurred generally to the declaration, on four grounds.

1st. That no estate in the lands, tenements and hereditaments, mentioned in the indenture in the declaration firstly mentioned, passed or had been conveyed to the plaintiffs by operation of the indenture in the declaration secondly mentioned, and bearing date the 18th day of July, 1842 ; and that the plaintiffs cannot, by virtue of the indenture secondly mentioned, sustain any action at law in respect of any of the matters contained in the said first mentioned indenture, and that the indenture secondly mentioned was wholly defective as a conveyance of real estate.

2ndly. That the declaration shewed that the cause of action set forth, originally accrued to the said Georgina Huson, in the said declaration mentioned, when sole and unmarried, that is to say on the 6th day of February, 1837, and that the indenture of the 18th July, 1842, so far as the lot in question, that is to say, the south half of lot No. 19, in the 4th concesssion of Mariposa, was concerned, only transferred to the plaintiffs a chose in action, which could be sued at law in the names only of Samuel B. Harman and Georgina Huson, his wife.

3rdly. That the recital in the second indenture enured by estoppel to preclude the plaintiffs asserting that the said Georgina Huson was not, at the date of the first indenture, seised of the lot in question ; and that if she was so seised, or if plaintiffs were estopped thereby from denying that she

was, then the plaintiff could have no cause of action, because *non constat*, but that the defect in the title, if any existed at the date of the indenture of 6th February, 1837, was rectified so as to complete the title in Georgina Huson, prior to the 18th July, 1842.

4thly. That the second indenture, by reason of the word "use" being omitted in the granting part to these plaintiffs, passed no legal estate in lands to the plaintiffs, so as to enable them to sue in respect thereof in a court of law.

Gwynne for the demurrer. *Cameron, Q. C.*, contra.

The following cases were cited on the argument—1 *Eden's R.* 361, 367; 9 *E. R.* 1; 1 *M. & S.* 354; 4 *M. & S.* 53; *Spence's case* in *Smith's Leading Cases*; *Cro. Eliz.* 436; 7 *T. R.* 654; 4 *Cruise*, 178; 1 *Cruise*, 431, 432, 439, 448, 458, 462; *Gilbert's Rep.* 17; 1 *Atk.* 591; *Lord Ray.* 33; *Forrest*, 145; 2 *P. W.* 147; 2 *T. R.* 450; 1 *Eq. Ca. Abr.* 383; 2 *Taunt.* 109; *Co. Litt.* 384 (b); *Shep. Touch.* 161, 502, 510-11; *Cro. Eliz.* 863; 4 *T. R.* 78; 1 *Roll. Abr.* 521; *Cro. Car.* 222; 3 *Lev.* 46; *Hob.* 12.

ROBINSON, C. J., delivered the judgment of the court.

The defendant's first objection in support of his demurrer was that Georgina Huson, having in her deed to these plaintiffs, made on the 18th July, 1842, recited that she "was then possessed in her own right of the land in question," the plaintiffs, as parties to that deed and claiming under it, were bound by that and were estopped from denying its truth, and should not therefore complain in this action that she was not seised. (8 *M. & W.* 209.) But there are several reasons why that objection cannot prevail, admitting that a party is in many cases bound by his own recital in a deed of a particular fact. Yet, to make it an estoppel, the recital must be direct, precise and particular. Here the recital by Miss Huson, in her deed to her trustees, is only that she was then possessed in her own right, which does not amount to any admission that this defendant, at the time of his making the conveyance to her, was lawfully seised of a perfect and absolute estate of inheritance in fee simple, and that is the point in question.

Then besides, Rees being no party to the indenture which

contains the recital, whatever might be the effect *inter partes*, he could take no advantage of the estoppel, for there would be no mutuality.

If this objection could be supported, then in almost every case in which an assignee could sue on a covenant for title, running with the land, he would be estopped: for the deed under which he takes, as grantee, would generally contain a recital or express covenant that the grantor was seised. —8 M. & W. 209.

The second objection is, that the covenant was broken as soon as made, according to the statement in the declaration; and that if Rees had no estate none could pass to Miss Huson, and from her to the plaintiffs, her assignees, wherefore this cannot be a case of covenant running with the land. *Kingdon v. Nottle*, 4 M. & S., is an express decision against that objection, for there the action on a covenant for title was brought by the devisee of the testator, with whom the covenant was made; and the breach charged was, that the defendant when he gave the covenant was not seised in fee.

The defendant raised the objection on demurrer, that the covenant being broken in the testator's lifetime could not be assigned, and that the devisee could not as assignee maintain the action on the covenant. But the court held, that so long as the defendant had not a good title there was a continuing breach. And Dampier, J., observed, "this is a covenant which runs with the land, but if it may be broken but once, and ceases *eo instanti* that it is broken, how can it be a covenant which runs with the land?" They sustained the plaintiff's action as assignee, though the breach complained of was, that the defendant, who conveyed to the plaintiff's testator, was not seised, and had not good right to convey. And this case is so far stronger, that the plaintiffs here are in fact suing on the behalf of Georgina Huson, to whom the covenant was made, and are claiming damages on her account, and for her benefit. This action is substantially her action. If the title of Rees had been good, the land would now be vested in these plaintiffs as

trustees—the object of the action is to recover for her the value.

In *Kingdon v. Nottle* the testator had entered and enjoyed under his deed before he devised, and his devisee had afterwards entered and brought an action on the covenant in consequence of a defect in the title. It is alleged in these proceedings, that after the defendant made this covenant, Georgina Huson conveyed the land to these plaintiffs by indenture, “by virtue of which indenture, the plaintiffs afterwards became and were and from thence have been and still are seised in fee, of and in all the said parcels of land of which the defendant was at the time of making the indenture seised in fee; and that the plaintiff, by virtue of the same indenture, became possessed of the first indenture, and entitled to the benefit of the defendant’s covenant therein contained.” It then alleges that “one J. F. W. was long before and at the time of making the first mentioned indenture, lawfully seised of an estate of fee simple in the land now in question, by means of which the plaintiffs have lost and been deprived of the said last mentioned land and premises, and have lost and been deprived of the rents, issues and profits thereof.”

It is not charged in this declaration that there was an eviction of the covenantee before the assignment, as was the case in *Lucy v. Levington*, 2 Lev. 26. For all that is stated in this record, the fact may have been that the land in question may have been lying waste and unoccupied at the time of Rees conveying to Miss Huson, and may have continued so till after she conveyed it to the plaintiffs, her trustees. That is quite consistent with the averment that Williams was, at the time of the conveyance by Rees, “lawfully seised of an estate in fee simple in the same land; for if he had the legal title to the land, he would be so seised in law and in fact, so long as no other person was actually in possession, holding him out. And yet, if it were under such circumstances that the deed was made to Miss Huson, and the subsequent deed by her to these plaintiffs, there can be no question that the plaintiffs, as assignees, could bring an action on the covenant for title, though it

was certainly broken in the time of the covenantee; and they could claim damages, as they had done here, for the continuing consequence of that breach, namely, the loss of the rents and profits as trustees. Nothing more is shewn in this declaration, than that when Rees assumed to convey, instead of his being legally seised of the estate (as he covenanted he was), the title was in another, which is the very breach complained of in all such cases; and that in consequence of the title being in another, the assignee of his vendee is deprived of the rents and profits, which is the damage naturally resulting from the breach.

Whatever might have been the case, if, at the time of the first deed being made Williams had been actually in adverse possession, or if Miss Huson had been evicted before she made the deed to the plaintiffs, I consider that upon the case stated in these pleadings, the plaintiffs have a clear right of action; otherwise a covenant for title would not be a covenant running with the land, and of which an assignee can have the benefit, but it is very clear that it is a covenant of that kind. *Wolton' case*, 1 *Anderson*, 55, and *Kingdon v. Nottle*, 4 *M. & S.* 53, already referred to, fully support this action. I cite also—*Fitz. N. B.* 145; *Jenkins' Centuries*, 6 *Pl.* 24; *Lucy v. Levington*, 2 *Le.* 26; *Platt on Covenants*, 516; *Co. Litt.* 384 (b).

It is easy to distinguish this case from cases of collateral covenants to do some particular act, of which the covenantee only was to have the benefit, and of which there is an end when they have been once broken; and of covenants which have been broken in the time of the covenantee and when the breach occasions a damage which does not in its nature affect the assignee—of which cases there are many examples in the books.—*Cro. Eliz.* 863.

I consider that a covenant for title, with the grantee and his assigns, is one which clearly runs with the land, as it equally would though assigns were not named; and that the grantee assigning his supposed estate, his assignee acquires a right to sue upon the breach of that covenant, and to recover damages, when he shews that the grantor had either no title or not a good title when the first deed

was made by him, at least when it has not been shewn that either of the deeds must have been wholly inoperative to pass any estate, not merely by reason of the first grantor having no interest when he assumed to convey, but by reason of his having been evicted before assignment.

I lay no stress on the fact that the plaintiffs in this case are the trustees of the covenantee, holding for her benefit and suing on the covenant in her behalf, because it is the legal and not the beneficial interest in the covenant which must govern in court of law, with respect to the party who must sue. But I consider that upon a covenant for title, it is not essential that the person who sues as assignee should shew that a legal interest passed to him under the deed. His cause of action is that he has not the interest which he supposed he was acquiring, and which he would have had if the title of the covenantor who executed the first deed had been good.

The third objection taken by the defendant is, that under the second deed the use was executed, by the statute, in Miss Huson and her intended husband; and that the legal estate is therefore now in them, and that they only, and not the trustees, have a right to sue on the covenant.

That objection is grounded on a peculiarity in the second deed, namely, that it does not express, in the *habendum*, that the bargainees are to hold the land "*to their use*," This, it is urged is a defect in the conveyance; and that the consequence is, that no use being declared in the bargainees, but the land being conveyed to them to hold upon *uses* which relate to Miss Huson and the intended husband, the legal estate under the statute follows the use, and becomes vested in them and not in the trustees. There can be nothing clearer, however, than that this is not so.

By the first deed, Miss Huson, reciting that she is possessed of this land in her own right, in consideration of the intended marriage and for a further pecuniary consideration of ten shillings, acknowledged to be paid by these plaintiffs, "*bargains and sells this land to them, to hold to them, the bargainees, their heirs and assigns, to and for the several uses, upon the trusts, and for the intents and purposes therein de-*

clared; which uses, trusts, intents, and purposes, it is clear, all points to the intention that it is through the hands of the trustees the husband and wife, or their issue, are to receive the rents and profits, and not that the legal estate is simply to be held by the trustees, while the husband and wife or their children, are to take with their own hands, and immediately from the estate, the rents and profits. This is clearly a *trust* and not an use, to be executed under the statute in the *cestuis qui* trusts. And if the word *use* had been nowhere mentioned in the deed, yet this is not a case in which there could be any resulting use or uses by implication in the bargainor, as owner of the estate, because that would be to raise a use by implication contrary to the manifest intent of the parties, which is never done.—Touch. 502, 510. In this case, such a construction would defeat the very object of the protection intended to be afforded to the wife, through the intervention of trustees.

And as to the idea that the legal estate could not be in the plaintiffs under the second deed, for want of words in the habendum expressing that they were to hold it “*to their use*,” there would be no difficulty in that respect, if Miss Huson, the bargainor, had had a good legal estate to convey. That an estate did not in fact pass, we must take upon the plaintiffs’ own shewing; for they state that, at the time of the conveyance, the whole legal estate was in Williams. If that would disable these plaintiffs from suing as assignees, upon the ground that the land did not pass to the plaintiffs, and that the covenant therefore could not run with it, their action would fail on the objection which has been already discussed; but there can be no doubt that, if Miss Huson’s title had been good, it would have vested under the second deed in the trustees.

There is no occasion to declare, in a bargain and sale, that the estate is to be held to the use of the bargainees. I mean, the word “*use*” is not indispensable; for the pecuniary or other valuable consideration, however small, raises the use in favor of the bargainee who pays it, and the statute does the rest by transferring the use into possession.

A bargain and sale is nothing more than the conveyance

of the use, and it is only on that principle that it has any operation by the aid of the statute. The use, which of itself arises by reason merely of the pecuniary consideration, is executed under the statute upon enrolment, and in this country upon registry, which we have substituted for it.

It is superfluous in any deed of bargain and sale to express that the land is to be held to the use of the bargainee, and the omission of any such declaration is no defect; for there can be no other limitation of the use than to the bargainee, neither is there any danger that where it is omitted the use will be executed in favour of any other person, in trust for whom the land is to be held by the bargainee, for that would be to limit an use upon an use which is not admitted.

The use in the bargainee being deemed to be raised upon the principles of the common law, by the pecuniary consideration acknowledged to be paid, the Statute 27 Henry VIII., ch. 10, annexes to that the actual seisin and legal estate; and it is the peculiarity of this mode of assurance by bargain and sale, which in itself transfers no seisin, but is the mere conveyance of a use to the bargainee, that the bargainee can hold it to nobody's use but his own, and that a limitation to the use of any other person would be void, as being a use upon a use.

The bargainee holding the legal estate under this form of conveyance, as the grantee of a use which the statute has by its operation transferred into possession, may hold it in trust for another person, and upon particular uses which are in effect trusts, but he cannot hold it generally to the use of another in such a sense as that the statute can execute such second use.

It is necessary that the trustees should take the legal estate in this case, in order to enable them to perform the trusts. *Harton v. Harton*, 7 T. R. 652, and a multitude of other cases, might be cited on that point. There was no intent to convey the estate to the use of Miss Huson and her intended husband, in the sense in which the word "use" is employed in the Statute of Uses. They have a trust under the deed, not a use such as the statute could execute. This

is perfectly plain, and shews the distinction between a use and a trust; a distinction which was adopted and acted upon immediately after the Statute of Uses, and on which the whole system of trusts as distinguished from uses is founded, rendering indeed in a great measure inoperative the Statute of Uses itself, so far as regarded the especial object of it.—See 4 Cruise, 178; Gilbert's Rep. 17; 1 Cruise, 431-9; 1 Alk. 591; Lord Raym. 33; 1 Cruise, 458, 462; Forrest, 145; 2 P. W. 147; 2 T. R. 450; 1 Eq. Ca. Abr. 383; 2 Taunt. 109.

There was another objection taken upon the demurrer, that the declaration does not shew that Miss Huson, or the plaintiffs, may not have been seised of a good estate in the land at the time this action was brought. It is urged that they may have had their title made good since the covenant was given, and either before or after the assignment to the plaintiffs.

The answer to that is, that if the fact were so, it should be pleaded by the defendant; but, if pleaded, it would not be a bar, since the covenant would nevertheless have been broken; though to be sure, as regards these plaintiffs, if Miss Huson did receive a title before she assigned to them, they would have no action by reason of a breach, which could in that case be no injury to them.

The declaration, however, is in the common form when the assignee is suing, and is upon principle sufficient.

Per Cur.—Judgment for the plaintiffs on demurrer.

SHORT V. McMULLEN.

Plea of defendant's bankruptcy—Demurrer.

Held, per Cur., that the following general plea of bankruptcy, "that after the making of the promise, and after this action had accrued, he became a bankrupt," without averring that he became a bankrupt before action brought—or that he had obtained a certificate—was good on special demurer.

Declaration on the common counts.

Plea; that after the making of the promise, and after this action had accrued, the defendant became a bankrupt.

Demurrer: because the plea did not aver that the defendant became a bankrupt before action brought, and also did not aver that the defendant had obtained his certificate.

Hawke for the demurrer. *Dempsey* contra.

The cases cited on the argument were—3 Chit. Pl. 79 ; 1 Tyr. 437 ; 6 Moore, 495 ; 1 C & J. 549 ; 10 Moore, 246 ; 4 T. R. 156.

ROBINSON, J. C., delivered the judgment of the court.

The defendant pleads that, *after* the making of the promise and after this action accrued, he became a bankrupt ; not averring that he became a bankrupt before action brought, nor that he had obtained a certificate. But according to the case of *Tower v. Cameron and Kennedy*, 6 E. R. 413, that is not necessary. The circumstances under which it is permitted to the defendant to plead the defence in this general form, are left to be proved in evidence.

If he is in a condition to set up the defence, that will appear at the trial ; but the plea itself, supposing him entitled to use it, is authorised to be framed in those general terms.

The 64th clause of our statute 7 Vic. ch. 10, appears to give the bankrupt the privilege of pleading in the general form, under the same circumstances as it could have been pleaded in England.

Per Cur.—Judgment for plaintiff on demurrer.

BABY ET AL. V. ARDIN.

Pleadings.

The plaintiffs sued for work and labour as attorneys in the first count, and then added two counts for money paid, and an account stated, not stating by or with them as attorneys. The defendant pleaded to the *whole declaration*, as if the plaintiffs had been claiming the moneys as attorneys—*Held, per Cur.*, plea bad.

Declaration: 1st count for work and labour as attorneys.

2nd count—money paid.

3rd count—account stated.

It was not stated that the money was paid by the plaintiffs, in the 2nd count, *as attorneys*; or the account stated, in the last count, with the plaintiffs as attorneys.

The defendant, however, pleaded to the 2nd and last count, as if the moneys were claimed by the plaintiffs, in those counts, as attorneys, to which the plaintiffs demurred.

Cameron, Q. C., for the demurrer. Becher contra.

The authorities cited were—*Donnelly v. Davidson*, in our court; 15 Law Jl. Q. B. 364; 7 Dowl. 360.

ROBINSON, C. J., delivered the judgment of the court.

The plea is clearly bad, for it states that the moneys, in the 2nd and last counts of the declaration, are claimed by the plaintiffs to be due to them for work and labour as attorneys; whereas the declaration states nothing of the kind. If the moneys were due on that account, the defendant should have said so, and framed his plea accordingly; but it is incorrect to say that the plaintiffs claim the money on that account, for they do not.

Per Cur.—Judgment for the plaintiff on demurrer.

R. & J. W. DEMPSEY V. WINSTANLEY.

Pleadings.

A plea, that there was no written contract as required by the Statute of Frauds is bad, as amounting to a denial of the contract.

A plea that a copy of the attorney's bill was not delivered according to the statute, is not a plea to the merits; judgment for the plaintiff, therefore, on this plea, is no bar to a second action.

Declaration: special assumpsit by attorneys against defendant, upon his promise that if plaintiffs would conduct the petition of an insolvent debtor for his discharge, he, the defendant, would be answerable for the costs.

2nd plea: that there was no written contract, as required by the Statute of Frauds.

3rd plea: traversed the fact of plaintiffs' procuring the insolvent's discharge.

4th plea: a long plea, averring in substance certain facts, shewing that a former action, which had been brought for the same demand, was held by the court to have been brought too soon, that is, before any copy of the attorney's bill had been served, as the statute requires.

Demurrer to 2nd plea: that it was an argumentative general issue.

To 3rd plea: that it traversed an immaterial fact.

To 4th plea: that the facts alleged therein amounted to no defence at law.

Eccles for the demurrer. *Crooks contra.*

The cases cited were—2 U. C. R. 401; Chit. jr. Pre. 308; 4 Bing. 470; 2 A. & E. 78; 2 B. & Al. 662.

ROBINSON, C. J., delivered the judgment of the court.

The 2nd plea, which sets up that there was no written contract, as required by the Statute of Frauds, is bad, as amounting to a mere denial of the contract—an argumentative general issue. It was so held by us in *Birdsall v. Darling*, 2 U. C. R. 401, on the authority of English decisions there referred to. It had in several cases in England been held otherwise, and I confess I think it would have been better if those decisions had been adhered to.

The 3rd plea is clearly bad in substance, being no defence against the demand. It assumes that an attorney can only be entitled to his reward when his services are successful. The plaintiffs have, without necessity, set forth in the declaration that they did procure the discharge of Stephenson; but the defendant cannot rest his defence on a denial of that unnecessary allegation. The promise is not so stated in the count as to make the fact of procuring Stephenson's discharge a condition precedent to the plaintiff's right to sue. Indeed, this plea was given up on the argument.

The 4th plea is, in our opinion, bad both in form and substance. It is so framed as not to be intelligible; the defendant speaking sometimes of the plea which was pleaded in the former action, as if it were pleaded in this; and in substance the plea is no defence, for it only amounts to this, that a former action, which had been brought for the same demand, was held by the court to have been brought too soon, that is, before any copy of the attorneys' bill had been served, as the statute requires. The omission to serve a copy of the bill could only prevent the plaintiffs from recovering in that action, and it was not a judgment against the plaintiffs on the merits.

In *Beck v Mordaunt*, 4 Doug. 113, the court determined, that a plea that a copy of the attorneys' bill had not been delivered according to the statute, could not be treated as a plea on the merits.

Per Cur.—Judgment for plaintiffs on demurrer.

PARKE ET AL. V. DAVIS ET AL.

Pleadings.

In case by the plaintiffs in ejectment against A. and B., as common carriers, for not delivering within a reasonable time the record of Nisi Prius, at the assize town—*Held, per Cur.*, that it was not competent for the defendants to put in issue the plaintiffs' title to the land.

Where several defendants are charged as common carriers in case, and they plead, traversing only the delivery to them of the parcel, without saying "or any or either of them"—*Held, per Cur.*, plea good.

Declaration: case against defendants as common carriers for not carrying, within a reasonable time, for the plaintiffs, who were plaintiffs in an ejectment suit, the nisi prius record from Hamilton to Simcoe, whereby the plaintiffs lost the assizes, &c.

2nd plea: traverse of the delivery and receipt of the parcel to and by the defendants, without adding "or any or either of them."

3rd plea: traverse of plaintiffs' title to the lands sued for in the ejectment.

Demurrer to 2nd plea: because, this being an action of tort, the plaintiffs had a right to recover against some of the defendants, although the parcel was not delivered to or received by all of them.

To 3rd plea: because it traversed an immaterial issue.

D. B. Read for the demurrer. *Freeman*, of Hamilton, contra.

The cases cited were—1 P. & D. 9; 3 U. C. R. 360; 1 Bing. N. C. 323; 2 U. C. R. 257; 13 M. & W. 30; 5 B. & Ad. 395.

ROBINSON, J. C., delivered the judgment of the court.

The 3rd plea is no doubt bad. It was not competent to the defendants to put the plaintiffs to the proof of their title, and it is absurd indeed to see any semblance of attempting to form such an issue in such a case.

As to the 2nd plea, the plaintiffs charge the defendants clearly on their duty only as common carriers. The action is in case and not in assumpsit; and so far as the form of action therefore is concerned, the verdict might be against any one or more of the defendants, acquitting others.

But the plea denying, as it does, only the receipt of the parcel, admits that the defendants were common carriers

and jointly chargeable in that capacity in respect to the parcel, if they had received it. This being so, a delivery of the parcel to one would be a delivery to all: and there is therefore no difference between the denial of a delivery to any, and of a delivery to all.

It seems to me that the traverse of the alleged delivery to and receipt by the defendants is sufficient, without adding the words "or any or either of them."

Per Cur.—Judgment for defendants on demurrer.

ROCKWELL V. MURRAY.

To an action of trespass for breaking and entering plaintiff's house—the defendant pleaded that the plaintiff was violently assaulting his (the plaintiff's) wife and child—and that he entered, &c., as he lawfully might do, to prevent the plaintiff committing the said breach of the peace: *Held per Cur.*—Plea bad in substance.

Trespass, for breaking and entering plaintiff's house.

Plea.—That at the time of the committing of the said supposed trespasses, in the declaration mentioned; to wit, on the day and year last aforesaid, the plaintiff was conducting himself in the said dwelling house, in which, &c., in a violent and outrageous and riotous manner, and was assaulting the wife and child of him, the said plaintiff, and the defendant committed the said supposed trespasses, as in the declaration mentioned, as he lawfully might, to prevent the plaintiff committing the said breach of the peace, against the said wife and child of the plaintiff; and this the defendant is ready to verify, &c.

Demurrer.—Because plea no justification.

Read, for the demurrer. *D. G. Miller*, of Woodstock, contra. The cases cited were—1 T. R. 334; 2 B. & P. 260; 7 Scott, 936.

ROBINSON, C. J., delivered the judgment of the court.

We are all clearly of opinion that this plea is bad. It is only necessary to read the pleadings and the judgment in the case of *Handcock v. Baker*, and others, 2 B. & P. 262, to see in how many points this plea fails.

If the facts stated in this plea were held to be a legal justification for any person not a peace officer breaking

into his neighbour's house, there would be little reality in the security which the law is supposed to afford for the peaceable possession of one's dwelling.

Per Cur.—Judgment for plaintiff on demurrer.

NORDHEIMER ET AL. V. O'REILLY ET AL.

The defendants were sued as maker and endorser of a note, under the statute 3 Vic., ch. 8—the declaration, after setting out the note and endorsement, stated the defendants liability, thus: “whereby *the defendants became liable*, &c., *Held per Cur.*—on special demurrer—declaration bad, in not alleging according to the form, *a joint and several liability*.

Declaration.—Indorsee against maker and indorser of a note, where, after setting out the note and endorsement, it was added, whereby *the defendants became liable*, &c.

Demurrer.—Because, the defendants being sued under the form given by the statute 3 Vic., ch. 8, the liability of defendants was not alleged to be *joint and several*, as it should be.

Richards, for the demurrer. *Hawke*, contra. The cases cited were—4 U. C. R. 145 ; 2 U. C. R. 139 ; 3 Vic., sec. 2., ch. 8.

ROBINSON, C. J., delivered the judgment of the court.

In this case the point is exactly the converse of that in the Bank of Upper Canada v. Gwynne et al., 4 U. C. R. 145. There the plaintiffs suing in one action several persons who had jointly accepted a bill, averred that by so accepting, “they became jointly and severally liable,” which was repugnant to the law and fact of the case.

There the form given in the statute 3 Vic., ch. 8, was thoughtlessly followed in a case to which that form was in the nature of things inapplicable, and by stating the contract as it was there stated, the legal effect of the evidence was misrepresented, for the statute was never intended to make such a change in the law, as that joint makers or indorsers of a note or bill should be treated as several contractors. That would be introducing confusion, as regards the defences that might be set up.

So here the plaintiffs, in a case which evidently must come under the statute 3 Vic., ch. 8, depart from the form

permitted by the statute in a point which we think we cannot treat as wholly immaterial, for instead of averring that the defendants became *jointly and severally* liable, and that they jointly and severally promised to pay as the form runs, this declaration, after stating the making of the note by one defendant, and the endorsement by another, merely alleges that the defendants *became liable* to pay, and that they promised to pay the money to the plaintiffs, which form of words, in matters of contract, imports a joint liability only; and that is not the footing on which the statute places the defendants.

We do not say that if this declaration had not been demurred to, we might not, on the facts stated in this record, have treated the defendants as being in fact severally as well as jointly liable, but we think it right that the form given by the statute should be adhered to on the point in question, because it shows the object and effect of the provision, and states truly on the record the nature of the liability of the parties.

Per Cur.—Judgment for the defendants on demurrer.

GERMAN V. GROOMS.

Dower—Statute of Limitations.

Our statute 4 Wm. IV. ch. 11, makes the remedy for dower subject to limitation, in point of time.

The right to dower commences on the death of the husband, and must be brought within 20 years from that time.

Declaration.—Action of dower.

Plea.—That the demandant's right to bring her action for dower, accrued to her more than 20 years before the commencement of this action.

Demurrer to plea.—That the statute of limitations does not apply to an action of dower.

McKenzie, of Kingston, for the demurrer. *Richards*, contra.

The following authorities were cited—Park on Dower; 2 Saund. 46; 2 B. & C. 725; 6 M. & W. 122; 4 Wm. IV. ch. 11, secs. 14, 16, 17 and 59.

ROBINSON, C. J., delivered the judgment of the court.

We consider that the claim to dower comes under that article of the 17th sec. of our statute 4 Wm. IV. ch. 1, which says, "that when the estate or interest claimed shall have been an estate or interest in reversion or remainder or *other future estate or interest*, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

The widow's interest or estate became first consummate on the death of her husband; and no person having yet obtained possession or received any profits in *respect of such interest* from the death of her husband, her right must be deemed to have accrued from the time when her estate or interest became consummate. Her right to a remedy is then perfect; and the provision in the 16th clause, that no person shall bring an action to recover any land but within twenty years next after the time at which the right to bring such action first accrued to the person bringing the same, seems clearly to apply to her case; for the 59th section of the statute declares that the word "land" shall extend to any estate for life or lives.

The 14th section of the statute shews a clear intention that the remedy for dower shall be subject to limitation in point of time.

We are of opinion that the tenant is entitled to judgment on the demurrer to the third and fourth pleas.

Per Cur.—Judgment for the defendant on demurrer.

NICOLLS V. MADILL.

The condition of a bond must be construed as a whole, and any apparent repugnance may be reconciled by giving the condition effect according to the intent appearing on the face of the whole instrument.

To bring the giving of a note in payment for land within the statute 32 Henry VIII., ch 9, care must be had to charge enough to meet the provisions of the statute. Where therefore the defendant merely averred that the plaintiff was not, for a year next before the bargain, "in receipt of the rent and profits," without saying that he was not "in possession of the land," or "of the reversion or remainder thereof"—*Held, per Cur.*, plea bad.

Declaration: 1st count, debt on bond; the condition of which was set out on oyer. 2nd count, on a promissory note.

Demurrer to 1st count ; that by the conditions of the bond as set out, it appeared the time for payment had not elapsed.

Plea to 2nd count: that he made and delivered the promissory note in that count mentioned, for and on account of and in part payment of the price of a certain parcel or tract of land and premises, which the plaintiff, before the making of the said promissory note, to wit, on the day of the making of the same, sold and bargained to the defendant, and to which the plaintiff then pretended to have title ; and the defendant saith that neither the plaintiff, nor any person or persons, by, through, or under whom he claimed, had at the time of such sale and bargain any right or title to the said land, or any part thereof, nor had he or they or any such person been in receipt of the rents, issues, or profits thereof, or any part thereof, for the space of one whole year next before the time of such sale and bargain, but that the right or title of the plaintiff in and to the said land and premises was a mere pretended right or title, and the sale and bargain aforesaid was contrary to the form of the statute in that behalf, and wholly void ; wherefore the defendant saith that there was no consideration for the making or delivery of the said promissory note, and this he is ready to verify, &c.

Demurrer to plea to 2nd count ; because it does not admit of the plaintiffs' taking thereon any certain issue, inasmuch as the plaintiffs' right and title to the said lot may not have been a perfect right, but an imperfect one, forming nevertheless a sufficient consideration for the plaintiffs' recovering from the defendant the said note ; and also because it does not state that neither the plaintiff nor any other person, &c., had at the time of the sale been in possession of the said land, nor of the reversion thereof, for one whole year next before the said bargain, but only that they had not been in receipt of the rents or profits thereof, &c.

Hawke opposed demurrer to the declaration and supported the demurrer to the 2nd plea. *Eccles contra*. No cases cited.

ROBINSON, C. J., delivered the judgment of the court.

The declaration, in our opinion, shews a good cause of

action, when read in connection with the condition of the bond, as set out on oyer.

We must construe the condition as a whole, and reconcile any apparent repugnance by giving it effect according to the intent appearing on the whole instrument; and it is plain that, under the condition several sums have become payable before this action was brought. The 11th day of February, 1840, is mentioned as the period when all the money is to be paid; and the bond is only subject to defeasance by its being paid in the mean time, according to the terms of the condition, which it never can be if the periods have already past when several of the payments were to be made, and if these are not yet made. The bond, therefore, for all that is shewn, may be in full force and not capable of being defeated by a performance of the condition, and the plaintiff may assign such breaches as will shew that he had a good right of action under it.

As to the second plea, which the plaintiff had demurred to, it is in our opinion insufficient; for though it relies upon shewing that the transaction out of which the note arose was void, under the statute 32 Henry VIII. ch. 9, it does not charge enough to bring the case within the statute since it does not aver that the plaintiff was not, for a year next before the time of the bargain, "*in possession of the land,*" or *of the reversion or remainder thereof*, but merely that he had not been *in receipt of the rents and profits of the land* for a year.

The plea is not excepted to as being double.

We think the plaintiff is entitled to judgment on the demurrer.

Per Cur.—Judgment for plaintiff on demurrer.

BRADFORD ET AL. V. O'BRIEN.

Where the plaintiff sets out *the* consideration on which the defendant's promise was made—a plea by the defendant, "that there was not at any time *any* consideration for making the promise"—is bad.

If the plaintiff parts with any thing that is of value to himself, to obtain the defendant's promise, that forms a valid consideration for the promise, though the thing parted with may be of no legal value in the defendant's hands.

An uncertainty in the statement of a part of the consideration for the defendant's promise, with respect to a part only of the plaintiff's demand, does not make the declaration bad on general demurrer.

Declaration.—Special assumpsit: For that whereas the defendant heretofore, to wit, 19th December, 1842, in consideration that the plaintiffs had then delivered to the said defendant, a *certain note* which the plaintiffs then held against one A. Ladd, on which said *note* there was a balance due the plaintiffs by the said A. Ladd, on the 1st of September, 1842, of \$400.33, which said plaintiffs aver is equal to the sum of 100*l.* 1*s.* 7*d.*, of lawful money of Canada, and which said note was of great value, to wit., of the value of 100*l.* 1*s.* 7*d.* of lawful money of Canada; made his certain agreement in writing, having date the 19th of December, aforesaid, and thereby promised to pay to the plaintiffs the sum of 100*l.* 1*s.* 7*d.*, in Michigan treasury warrants, being the said balance due on the said note to the plaintiffs, as aforesaid, by the said A. Ladd; and also, thereby promised to pay the plaintiffs a balance of account which the plaintiffs then had against the said A. Ladd, of \$57.77, which the plaintiffs aver is equal to the sum of 14*l.* 8*s.* 10*d.*, being the balance of the said account, in warrants, to wit, Michigan treasury warrants, the said sum of 100*l.* 1*s.* 7*d.*, being the balance of the said note, as aforesaid, which the plaintiff's held against the said A. Ladd, and the said sum of 14*l.* 18*s.* 10*d.*, being the balance of the said account which the plaintiffs held against the said A. Ladd, as aforesaid, amounting in the whole to a large sum of money, to wit, the sum of 114*l.* 10*s.* 5*d.*, the said *plaintiffs aver was to have been paid* by the said defendant, to the said plaintiffs, within a reasonable time from the time of the making of the said defendant's agreement, as aforesaid; and the plaintiffs further aver, that although a reasonable time for the payment of the said several sums of money, as aforesaid, by the defendants, hath long since elapsed, yet the defendant not regarding his promise and undertaking, has not as yet paid to the said plaintiffs the sum of 100*l.* 1*s.* 7*d.*, in Michigan treasury warrants, or in any other way or manner whatever; nor the said sum of 14*l.* 8*s.* 10*d.*, the balance of plaintiff's account against the said A. Ladd, in current money, if enough should be collected, if not, in warrants, to wit, in Michigan treasury war-

rants, as aforesaid, or in any other way, or either of the said moneys, or any part thereof; but the defendant to pay the same or any part thereof, according to the tenor and effect of the defendant's agreement, hath wholly neglected and refused, and still doth neglect and refuse, although the said plaintiffs have always been ready and willing to receive the same, as aforesaid, by means whereof the plaintiffs have been deprived of the use and benefit of the said Michigan treasury warrants and current money, and are otherwise injured.

There was a second count in the declaration not varying materially from the first.

3rd Plea.—That there was not at any time any consideration or value for the defendant's, making the said promise in those counts mentioned, or either of them, or any part thereof; and this the defendant is ready to verify, &c.

4th Plea.—A special plea, the effect of which was to set up a verbal understanding, varying and controlling the written promise mentioned in the declaration.

Demurrer to 3rd and 4th pleas.

The defendant excepted to the declaration, principally on the ground that no legal consideration was shewn for the promise,

McLean, for the demurrer. *Hagarty*, contra.

The cases cited on the argument were—1 Bing. N. S. 587; 1 Saund. 211 (6); 2 Saund. 137 (2); 3 P. & D. 286; Cro. Jac. 342; 8 Bing. N. C. 710; 5 B. & C. 83; 8 A. & E. 743; 3 Q. B. R. 34; 15 M. & W. 673.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the 3rd and 4th pleas are bad.

The declaration having, in both the counts which are answered by the 3rd plea, set out the consideration on which the defendant's promise was made, the defendant should have demurred if the consideration set out was insufficient, or should have traversed the consideration alleged, if such consideration was not in fact given. The third plea, therefore, which avers "that there was not at any time *any consideration* for making the promise, is clearly bad.

The 4th plea is insufficient on several grounds, one of which is, that it sets up a verbal undertaking to vary and control the terms of a written promise. If the defendant did, as he admits, promise in writing that he would pay the sums mentioned in treasury warrants, he cannot be allowed to set up that there was a verbal understanding between him and the plaintiffs, under which the agreement was to be binding or not, according as the defendant might or might not be able to collect the debts due to Ladd. There are several absurdities in the plea, among which is this, that the defendant would seem to be representing himself as acting in the capacity of executor of a will made by an attainted person, who by law could make no will disposing of his property.

But it seemed to be almost conceded on the argument, that the pleas could neither of them be supported, and the defendant applies himself rather to the task of shewing the declaration insufficient.

It appeared to me, on the argument, that some of his objections would be tenable, but after the best consideration I could give to the case, I do not feel warranted in holding either count to be insufficient on general demurrer.

It has been contended, that there is no legal consideration stated; but it is averred that then, that is, at the time of the transaction, the plaintiff delivered to the defendant a note which he held against Ladd, and on which nearly 100*l.* was due to plaintiff. It is not stated that the note so given up by the plaintiff to the defendant was a promissory note, transferable by delivery, and therefore of any certain value to the defendant; but that is not necessary, for if the plaintiff, in order to obtain the defendant's promise, parted with any thing that was of value to himself, that would constitute a valid consideration, though the thing so given up would be of no legal value in the defendant's hands.

There are many cases collected in Com. Digest, Action upon Assumpsit B., which have been decided upon this principle. I refer to *Mallery v. Lane*, Cro. Jac. 342, as one of these cases, and a number of others might be referred to.

It is well enough stated, I think, in both counts, that the

plaintiff gave to the defendant notes which he held against Ladd for a sum of money, as the consideration for the defendant making the promise stated, which was that he would pay the plaintiff a certain amount in Michigan treasury bonds. The defendant in his fourth plea treats the promise as made in the sense the defendant states it—that is, as an engagement to pay in treasury bonds, and made in return for a valid consideration; but he seeks to avoid it by an insufficient plea of subsequent failure of consideration mixed with an alleged understanding that the promise was not absolute but conditional; and this amounts to the general issue.

With respect to part of the consideration and promise—namely, the amount of the balance of account, the declaration is no doubt very informal, for it speaks of the plaintiff having delivered to the defendant “*a balance of an account*,” which he held against Ladd; and it is impossible to say what the plaintiff means by that, whether merely an account on paper, on which such a balance was stated, or something else; but any uncertainty in that statement would not warrant us in holding that either count contains no good statement of a cause of action, for that defect goes only to a part of the consideration, and concerns only a part of the demand.—Cro. Eliz. 759, 848; Com. Dig., Action upon the Case upon Assumpsit B. 13. Upon the whole, though the declaration has seemed to us to afford much room for question, we are of opinion that the plaintiff is entitled to judgment,

The pleas, we have no doubt are bad.

Per Cur.—Judgment for plaintiff on demurrer.

MYERS V. WILKINS.

Promissory Note, payable to the order of the plaintiff—Pleadings.

A note, payable to a person or his order, or to the order of a person, means the same thing, and may be sued upon, stating it either way. Where a note is drawn payable, “to the order of the plaintiff,” it need not be endorsed by the plaintiff to himself, to give it the effect of a note payable to the plaintiff.

Declaration.—Payee against maker of a promissory note, alleging that the defendant made his note, &c., and thereby

promised to pay *to the order of the plaintiff, &c.*; and then averring, that the defendant then delivered the said note to the plaintiff, and promised to pay the same according to the tenor and effect thereof.

Demurrer to declaration.—Because there is not anything in said first count stated, shewing that the said instrument declared upon was a promissory note at the time it was made, or at any other time after the same was made.

And also: because by the said first count of the declaration the instrument being therein stated as purporting to be payable to the order of the plaintiff, by which the same could not become a perfect promissory note, without the indorsement thereof by the plaintiff, and no indorsement being alleged in the said first count, the said instrument was not a promissory note at the time of the making thereof; and it is not shewn to have become one afterwards by the indorsement of the said plaintiff, or by his having ordered the same payable to any person, inasmuch as the said instrument purports to have been made payable to the order of the plaintiff, and not to himself or any other person certain, which is contrary to the statute in such case made and provided, and contrary to the law and custom of merchants.

Also: because the said instrument, in the said first count mentioned, is not negotiable, and thereupon no action could lie by the plaintiff against the defendant; nor is there in said first count, shewn any legal liability or promise from the defendant to pay the plaintiff the amount stated in said instrument.

Also: because any promise stated or shewn therein, is a promise to pay the amount mentioned therein to whomsoever the plaintiff should order the same to be paid; and it does not appear by said first count that the plaintiff ordered the amount mentioned therein to be paid either to himself or any other person.

Richards for the demurrer. *Wallbridge* contra. The cases cited were—1 D. & L. 376; 5 T. R. 476; 2 Show. 8.

ROBINSON, C. J., delivered the judgment of the court.

It seemed to be conceded on the argument that there is no ground of demurrer in this case.

Fisher v. Pomfret, 12 Mod. 125; Frederick v. Cotton, 2 Show. 8; and Smith v. McClure, 5 E. R. 476; shew, that a note payable to a person or his order, or to the order of a person, means the same thing, and that it may be sued upon stating it either way.

There was no occasion to aver an endorsement by the plaintiff to himself, in order to give it the effect of a note payable to the plaintiff.

Per Cur.—Judgment for plaintiff on demurrer.

BELL V. JARVIS, SHERIFF.

The District Courts, under the statute 8 Vic. ch. 13, sec. 5, have no jurisdiction in an action on the case for a false return to a writ of *feri facias*.

Appeal from the District Court of the Home District.

The only point in this case was, whether the District Court, under the statute 8 Vic. ch. 13, sec. 5, had jurisdiction in an action on the case for a false return to a writ of *feri facias*.

The plaintiff obtained a verdict in a suit of this description in the District Court and the defendant afterwards moved to arrest the judgment on the ground of want of jurisdiction.

The judge below upheld the verdict and discharged the rule.

The defendant appealed from this decision of the court below.

Hagarty for the appeal. *Durand* contra.

The authorities cited were—Jordan v. Marr, 4 U. C. R.; Billings v. Nichols, 5 U. C. R. 622; Bac. Abr. Courts, D. 3.

ROBINSON, C. J., delivered the judgment of the court.

This is an attempt, and, so far as we know, the first that has been made, to recover in the District Court, in an action on the case for a false return to a writ of *feri facias*.

The statute 8 Vic. ch. 13, sec. 5, gives jurisdiction to the District Courts in all matters of tort relating to personal chattels, and because a false return is a tort, and because the return of no goods "relates to personal chattels," it is contended that these courts may take cognizance of such actions.

But we are clear there is no jurisdiction.

The defendant pleaded to the action; and upon a trial, the plaintiff obtained a verdict on the 2nd count, and the defendant on the 1st; and a motion was afterwards made in the District Court to arrest the judgment, and a rule nisi obtained, which the judge of that court discharged. From this decision an appeal is made to us, and we think the judgment so given must be reversed, and the judgment on the verdict arrested.

Per Cur.—Judgment below reversed.

HAACKE V. GORDON.

Whether a person has made himself an executor *de son tort*, is a mixed question of law and fact. The jury must in the first place find the facts, if disputed, and the court are to say whether those facts create the executorship.

A party may make himself an executor *de son tort* by answering as executor to any action brought against him, or by pleading any other plea than *ne unques* executor.

Appeal from the District Court of the Huron District.

This was an action brought against an executor, to recover the amount of a note made by his testator.

The defendant pleaded, *denying the making of the note by the testator*, and also *ne unques* executor.

The jury found the note to have been made by the testator; and, upon the charge of the judge below to that effect, left the question of the liability of the defendant, as an executor *de son tort*, to be determined subsequently by the judge upon his consideration of the conflicting evidence offered upon that point at the trial.

The judge below, in term time, considered that the evidence did not make the defendant an executor *de son tort*, set aside the verdict for the plaintiff, and directed one to be entered for the defendant.

This judgment was appealed from, upon the ground that the executorship *de son tort* was a mixed question of law and fact, and should have been so left to the jury; and also, that the pleading adopted by the defendant estopped him from denying his executorship *de son tort*.

Becher for the appeal. *Cameron*, Q. C., contra.

The authorities cited were—Williams on Executors, 139 ; 4 M. & W. 9 ; 2 T. R. 97.

ROBINSON, C. J., delivered the judgment of the court.

I fear from the manner in which this case is reported, that the judge of the District Court was under an impression, at the trial, that the question, whether the defendant had made himself liable as executor *de son tort*, was one with which the jury had nothing to do ; that they had only to find whether the testator made the note ; and that he would determine, after the trial, whether the issue upon the plea of *ne unques* executor should be found for the plaintiff or the defendant.

And so it would be properly a question for the court, if the facts were undisputed upon which the legal opinions were to be formed. But here the plaintiff's witnesses swore to facts, which beyond doubt, would entitle the plaintiff to succeed upon the issue, denying the executorship ; and, on the other hand, the defendant's witnesses gave evidence which went far to repel the statements of the plaintiff's witnesses. It did not, however, so completely settle the question of fact as to leave the jury nothing to consider. On the contrary, there was conflicting testimony, which made it a case on which the jury must first pronounce as to the facts, and then, whether the facts which they should find were such as made the defendant executor in his own wrong, would be a question of law to be determined by the court. The case of Padget et al. v. Priest et al. 2 T. R. 97, states the principle clearly.

It may be however, that in this case the parties did agree (though that is not usual) to leave it to the judge to weigh the evidence upon the question of executorship, after the trial, &c., and decide it in the place of the jury.

Whatever may have been the fact in that respect, it seems clear, upon the authorities, that the record was of itself decisive against the defendant ; for by his having pleaded that the testator did not make the note, he makes himself executor.

It is laid down in Bacon's Abr. Exec. B. 3, that a person may make himself executor *de son tort* by answering as

executor to any action brought against him, or by pleading any other plea than *ne unques* executor.

We are therefore of opinion, that the judgment which has been pronounced in the District Court—that verdict shall be entered for the defendant—and the judgment which has been thereupon entered, be reversed, and that the verdict which was rendered for the plaintiff shall stand.

Per Cur.—Judgment below reversed.

DOE TIFFANY V. MILLER.

The validity of a purchaser's title under an ex-sheriff's deed, made after the writ against lands had expired, and after he had gone out of office—what act of the sheriff, after a writ against lands has been put into his hands, can be said to be an inception of execution.

Held, per Cur. (Draper, J., *dissentiente*), that the facts mentioned in the statement of this case, (and which are to long to repeat in the digest) constituted such an *inception* of the execution *against lands* by the sheriff, during the currency of the writ—and while he was in office—that a deed, made under such execution, by the same sheriff—*after* the writ was current, and *after* he had gone out of office—passed the legal estate to the purchaser. *Held also* (Draper, J., *dissentiente*), that the conduct of the execution debtor (mentioned below) shewed an acquiescence on his part in the ex-sheriff's right to proceed with the sale of lands, as he did, under the writ.

The facts on which this case turns are stated in the report of the trial of an ejectment, in which the present defendant was plaintiff, against Mr. Tiffany, the lessor of the plaintiff in this action.—5 U. C. R. 79.

In consequence of the result of that action, Mr. Tiffany became plaintiff in ejectment, in order to try the validity of his title under a sheriff's sale upon a *fi. fa.*, at the suit of the Bank of Upper Canada, against the lands of Miller, the now defendant; and at the trial of this action, at the assizes for the district of Gore, in April last, a verdict was given for the plaintiff.

The defendant moved for a nonsuit on leave reserved, or for a new trial on the law and evidence.

The case was argued by *Cameron*, Q. C., and *Vankoughnet*, of Hamilton, for the plaintiff, and *Esten*, *Vankoughnet* of Toronto, and *J. H. Boulton, jr.*, for the defendant, and was rested by both parties wholly upon the question, whether the sale made by the late sheriff, Mr. Jarvis, under the *fi. fa.*, was under the circumstances valid.

The evidence upon the trial of this cause, in regard to the

acts of the sheriff, was the same as on the last occasion, and the same evidence was given for the purpose of shewing acquiescence, on the part of Miller, in the sale, so far at least as regarded its being conducted by Mr. Jarvis, under the old writ.

It was admitted, on this trial, that after the lands were advertised by Mr. Jarvis, the defendant had applied to the plaintiff in the writ for a postponement of the sale, which was granted.

The evidence of Mr. Jarvis was more positive on this trial than on the other, as to his having gone to the defendant, then residing on the block of land, in Hamilton, of which the premises now in question form a part, soon after the *fi. fa.* was delivered to him, and obtained from the defendant a list of lands owned by him out of Hamilton and liable to be sold under the writ; and that he did soon after, and, as he supposed, on returning to his own office, write down on the same paper, at the foot of such list, after the lands which the defendant had mentioned to him, "the six acres of land in the town of Hamilton, laid out in town lots, with buildings."

The jury upon the last trial, found expressly that the sheriff did take down the lands first enumerated on the list (as stated by him), between the 10th March, 1837, when he received the writ, and the 15th July, 1837, when he went out of office; and that he added, on the same list, the six acres in Hamilton, before the 15th July, 1837.

Whether he did any other act, between the receipt by him of the *fi. fa.* and his first advertisement, on the 31st March, 1838, the jury declared they were unable to say.

They found that the defendant, Miller, was aware of what was going on, but did not acquiesce at the time, and that he has not acquiesced in the sale by any act since. The grounds on which the nonsuit was moved at the trial were, that there was no such commencement of the execution by Jarvis, while he was sheriff, as authorized him to proceed in the execution after he ceased to hold office; and that if there had been anything which the law would regard as the commencement of execution, yet there was no such

continuance of the proceeding, down to the sale, as the law requires; that is, no sale advertised while he was in office, nor any regular postponements of sale, from the first publication to the day of actual sale.

The authorities cited on the argument were—1 U. C. R. 304; Doe dem. Harley v. McManus, 1 U. C. R. 141; Doe dem. Bell v. Orr, Hil. T. 7 W. IV.; Horwood v. Phillips, and O'Keat v. Clifton, Or. Bridgman's Reports; Doe Spafford v. Brown et al., E. T. 4 W. IV.; Doe McGillis v. McDonald, E. T. 4 Vic.; 1 Vern. 105; 1 M. & S. 425; 6 M. & S. 110; Dyer, 363, 241; Sewell on Sheriff, 208; Str. 509; 15 E. R. 610; Co. Litt. 360 (a); 3 Keble, 243; 3 Eq. Ca. Ab. 381; Dougl. 473; 1 Vent. 259; 1 B. & Al. 40; 3 T. R. 292; 2 Shower, 95; 8 E. R. 475; 11 A. & E. 37; 1 T. R. 4; 1 Salk. 323; 6 Mod. 298; 1 B. & Al. 230; 1 Mod. 30; 1 U. C. R. 195; 5 Co. 90; 8 Co. 143; Doe Hagerman v. Strong, 4 U. C. R. 510; Doug. 473; 2 Saund. 68 (a); 1 B. & Al. 40; 10 Bing. 182; 1 P. W. 738; 2 Bing. 479; 1 M. & S. 711; 6 E. R. 523; 2 Lord Ray. 996; 7 M. & W. 372; 14 M. & W. 239; 2 Shower, 85; 1 Cl. & Fin. 98; Doe Greenshields v. Garrow, 5 U. C. R. 237; 1 Ves. senr. 195.

ROBINSON, C. J.—There are two questions to be considered. 1st. Whether what was done by the late sheriff was shewn upon the trial to be legal. 2ndly. Whether the defendant is in a situation, after what has occurred, to attempt to invalidate the title of the purchaser, by such objections as he has raised here.

The British statute 5 Geo. II. ch. 7, was cited in the argument as being necessary to be considered, for it is under that statute that real estate in this province is sold upon writs of *fiери facias*. It provides that "real estates in the British colonies, belonging to any person indebted, may be sold in satisfaction of debts; and that they shall be subject to the like remedies, proceedings and process, in any court of law or equity, for *seizing, extending, selling or disposing of*, any such real estate, towards the satisfaction of such debts, *and in like manner* as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts."

It does not seem to me that much stress can be laid upon this enactment for removing any doubt in this case. The statute speaks of "seizing lands" for the satisfaction of debts, and so may be said to contemplate an act of seizure by the proper officer; but it only subjects them to seizure in like manner as goods and chattels, if that shall be necessary or proper. It does not compel the adoption of any idle or useless ceremony by the sheriff, that may be inapplicable to that species of property.

In the statute of this province 7 Wm. IV. ch. 3, there is a clause (the 32nd) which deserves to be considered in connexion with this subject. It recites, "that in cases where writs of execution have been issued into several districts, upon which writs property, real or personal, may have been *seized or advertised*, which property has afterwards not been sold, on account of satisfaction having been otherwise obtained, or from some other cause, and it had been doubted whether a claim to poundage may not be advanced by the sheriff of each of such districts respectively, although no money has been actually levied under the writ;" and the clause provides that when upon any writ of execution sued out against the estate, real or personal, of the defendant or defendants no money shall be actually levied, no poundage shall be allowed to the sheriff, but he shall be allowed his fees for the services which shall be actually rendered by him.

The provincial statute 43 Geo. III. ch. 1, respecting the sale of lands and tenements by the sheriff, does not seem to affect this question; for it merely provides that the writ against lands shall not be made returnable in less than twelve months from the day on which the writ shall have been delivered to him.

Our King's Bench Act, 2 Geo. IV. ch. 1, sec. 20, recites, "that it is expedient to provide for the more public and certain notification of sales of lands under execution, in order that persons having claims may be apprised thereof;" and enacts, that before the sale of any real estate in execution the sheriff shall cause an advertisement to be inserted in the Upper Canada Gazette six times before such sale,

and to be otherwise published, in the manner pointed out by the act ; with a proviso, however, that nothing therein contained shall be taken to prevent an adjournment of such sale to a future day.

I know of nothing else in any statute, bearing on the question now before us ; and nothing more can fairly be collected from those which I have cited, than that the British parliament have allowed of lands being seized as well as goods for the satisfaction of debts ; they have neither directed that they shall be seized before sale, nor given any direction what the act of seizing lands shall consist in ; and our own legislature seems in a similar manner to have considered that, according to the practice of the courts, some act of seizing lands in execution might take place, for which it was fair the sheriff should be remunerated, not by poundage, but by a fee suited to the service. And they have directed, that before sale, the lands shall be advertised, which is therefore a legally authorized step, that may be taken towards executing the writ.

The question we are called upon to determine is, whether in this case anything was shewn to have been done by Mr. Jarvis while the writ was current, and before he went out of office, which can be called an inception of execution ; for otherwise he could have no right to proceed when he was no longer sheriff.

Doe dem. Harley v. McManus, 1 U. C. Rep. 141 ; Doe dem. Young v. Smith, & Campbell v. Clench, 1 U. C. Rep. 267, have been referred to, as bearing more or less on this case.

In the two last of them, we noticed that there seems little or no reason, in respect to lands, why the old sheriff should sell after he has retired from office, rather than leave that duty to be performed by the actual sheriff ; for that the reasons given in the case of Clerk v. Withers, Lord Raym. 1072, 6 Mod. 290, why such a course should be pursued in regard to goods seized, do not apply in respect to lands.— See 1 Salk. 320 ; 11 Mod. 35 ; Cro. Jac. 73 ; Yel. 44 ; Cro. Car. 450 : 1 Lev. 282 ; 1 Mod. 30. The sheriff has not the land actually in his hands ; he cannot remove it, and is not therefore liable to loss from casualties that might occur in

the interval before the sale. This, by our statute, must be a year; and if the sheriff were to put an officer upon the land or into the house, to take care of it during the year, I do not imagine that any necessity would be recognized by us for his putting the debtor or the plaintiff to that expense. So that I really do not see why, if a sheriff, having received a *fi. fa.* against lands, goes out of office before he sells them, the sheriff who succeeds him should not take up the process and complete it. It would be more fit certainly that he should do so, if for no other reason than because by that means the suitors interested would have the benefit of the covenant of the new sheriff's sureties, in case of his neglect or mis-conduct.

It may be said, on the other hand, that the former sheriff may have incurred expenses in advertising or otherwise, and should therefore be allowed, for his own protection, to carry the execution through; but that is a very unimportant consideration: for any such disbursement he has always a clear remedy against the party that employed him.

I must say, that when our attention is called to this subject, as it is on the present occasion, under rather unfortunate circumstances, it appears to be a very fit matter for legislative interference, in order that doubts may be removed and purchasers may know when they are safe.

The principle on which the old sheriff, in such cases, claims a right to proceed, is laid down in terms very general. It is, that the same person who commences execution is to perfect it; for the law regards it all as one act.

Upon the same principle it is that a sheriff sells goods or lands after the return of the writ, provided he has seized when the writ was current. He could not legally commence acting on the writ after the return day; but if he has commenced executing the writ before the return day, he may legally sell afterwards.

If Mr. Jarvis had continued in office to this time, the title of the purchaser in this case might have been questioned on the identical ground, I think, that it is questioned now. The objection would have been different in form, but it would have resolved itself into the same legal question:

Was there an inception of the execution before Hilary Term, 1838, when the *fi. fa.* was returnable ? for if not, then he could not legally sell the land in March, 1839, when it was sold ; because that was more than a year after the return. The same commencing to act upon execution which would have entitled him, if he had remained in office, to sell in 1839, would it seems to me, entitle him to sell at that time, though he was not then in office. And I confess, when I look at the case in that point of view, I am rather startled at the consequences which a decision may lead to.

I have observed it to be assumed, and apparently not questioned in other cases which have been before us, that the principles I have stated are applicable to executions against lands as well as those against goods. I believe that assumption has been acted upon, by the old sheriff selling land after he has retired from office, as well as selling after the return of the writ. The question occurs in both, what was the act done by him in any such case while the writ was in force and before he retired from office ? and what will a sheriff be safe in regarding as such an inception of an execution as will entitle him to go on and complete it, though he may be out of office and the writ no longer current ?

I apprehend that in many of such cases, perhaps in most, and I am not quite sure but in all of them, the lands have at least been advertised before the return of the writ ; thereby connecting by an official act the process of execution with the particular estate ; and I think this has in ordinary practice been taken to be sufficient. The number of cases in which a sheriff who has retired from office has afterwards proceeded upon an execution against lands, relying only on his having advertised while in office and while the writ was current, as giving him authority to go on and sell, may not have been many, though, from *Doe dem. Young v. Smith*, and *Campbell v. Clench*, and other cases which have been discussed, I have no doubt there have been such instances, and perhaps not a few. The number of cases in which the same sheriff who advertised the lands has sold them after

the return of the writ, I think has been very great. These all must depend for their regularity (I do not say necessarily for their validity) upon the question, which is in law a commencement of execution?

Whatever is laid down as a legal principle by us in one case, must govern all, unless when there has been something in the conduct of parties, as in *Doe dem. Harley v. McManus*, which may prevent an objection being taken to the legality of the sale, and so make the particular case an objection. And if the title of a *bona fide* purchaser at the sheriff's sale, relying as he will naturally do on the regularity of a proceeding openly conducted under the writ, can be impeached after ten years, which is the case here, it may on the same ground be impeached after any lapse of years short of twenty, and it can signify nothing whether the purchaser has in the mean time sold to others or made improvements of ten times the value of the land.

It is alleged that the land in question in this case has risen greatly in value, and that there are other lands which were sold at the same time to other parties under the same writ, on which valuable buildings have been since erected, and to which the question that is now stated must necessarily apply.

We cannot allow the consideration of this to sway our judgment on a strict point of law; and cannot out of regard to it, sustain any manner of executing legal process so loose and insufficient, that we cannot really doubt its being illegal and void. All the effect it should have, must be to make us extremely careful in any such case to satisfy ourselves that the proceeding is one that the law, duly administered, cannot uphold.

In addition to what I have already stated from the statute book, our absconding debtors acts direct the sheriff, upon an attachment, to *seize* all the estate real and personal of the absconding debtor, but by what act he is to denote the fact of seizing is not explained.

And the information which we can derive from adjudged cases, as to what constitutes seizure of a chattel real under an execution, is very scanty. We find it stated in cases

that the lease is sometimes seized, and the term sold, and I have no doubt that the seizure of the lease would be held a sufficient act to enable the execution creditor to make good his title under the writ against the assignees of a bankrupt, his debtor. I mean, that would be held to be a seizing under the writ—an execution begun.

But, whether the sheriff in any case, shall be able to lay his hands on the lease, or the title deed, where the estate is freehold, must be uncertain; it may be in other custody than the debtor's—the debtor may be a person holding as heir, and his interests may not appear in any deed which the sheriff can lay hold of. Though a seizure of a lease or title deed may be sufficient to constitute a levy, or at the least the beginning of a levy, it cannot be necessary to that end.

The advertizing the land for sale is an open, notorious act, directed by the legislature. The writ authorises and commands the sale; the advertisement is undoubtedly a step in execution of that command, since it is a step preparatory to the sale and expressly with a view to it. It announces that the sheriff *has seized* the land mentioned in the advertisement, and, when at the end of the time mentioned in it, the lands sold, the title of the purchaser can not, as I conceive, be made to depend on his being able to verify this act in pais of a public officer, namely, *the seizure*, whatever that may mean. Indeed, it has been determined long ago in this court, that the title of the purchaser does not require to be supported by proof of a regular advertisement; and this decision is in accordance with the sense of the legislature, expressed in the 22nd clause 6 Geo. IV. ch. 7, which regulates the sale of lands for taxes.

It is material also to consider, as was noticed on the argument of this case, that the statute 2 Geo. IV. ch. 1, which requires the sale of lands in execution to be advertised, gives as the reason for it, that persons having claims on the property may have notice; an object in which the debtor who owns the land is not concerned.

But we need not consider what might be the effect of not advertising the sale in common cases, because the sale in

question did not take place without advertising; and though objections were raised for want of proof of regular continued notices of postponement, we certainly never should hold that the title of a purchaser at sheriff's sale can depend on his being able to shew perfect regularity in this respect, after years had elapsed.

In the case of *Horwood v. Phillips*, (Sir Orlando Bridgman's reports 472) the court, reasoning upon the statute of Westminster 2nd ch. 18, which gives the *elegit* say "this clause of giving the defendant warning and executing the writ in his presence, is but direction to the sheriff to inform him what is fit, not coercive to make the writ void, if he do it not. And they add that in process of execution, though the sheriff do not all that is commanded him, yet if he hath warrant to do what he doth, it is well enough for the party." And in page 474, where the court considers the effect of the direction to the sheriff to take the goods in the first place, the command being "*et si forte*,"—*catalla predicta non sufficient in valore tunc medietatem terrarum liberari faciat*." The court observes that that clause, though in words conditional, is but direction; for if the sheriff shall return "*nulla bona*" and to extend the lands, the extent is good, though in truth he had goods sufficient, and no averment shall be against the sheriff's return. And by the same reason (the Chief Justice says), "if the sheriff make no return at all as touching the goods of A., being but a directive clause, I conceive the execution as to the lands is good, though the sheriff might be amerced. In the next case, in the same book of reports, *Keate v. Clopton*, 475—several clear distinctions are taken between cases where writs are founded upon a general authority, whether given by the common or statute law, and where the power or authority itself is originally limited or restrained by the act of parliament, in which case whatsoever is beyond that is void, as being without any authority whatever. I allude to those principles, as laid down in a judgment of high authority, because they strongly support the ground which we have taken in this court in cases where lands have been sold for taxes while there was distress upon the premises.

It is more to the purpose of this case to notice the general principle laid down in this same judgment, that "*multa quæ fieri non debent facta valent*," so far at least as not to make a nullity, *especially in the execution of writs, which the law favors*.

But then his lordship takes a distinction, which is very material here, and on the ground of which he held the extent then before the court to be totally void, so that any stranger even might take advantage of the defect. I ground "myself," he said "upon the difference taken in the case of the marshalsea, between an act done by one as a minister of justice, *who has no authority*; and when he hath authority, but executes it but in part, or there is some error in the execution or the writ. Where he hath no power or authority, it is merely void—(page 474.)

That comes to what is really the point in this case. Any thing done after the return day, upon a writ of execution which was not begun to be acted upon before, must no doubt be wholly void; so also, under a writ of execution directed to the sheriff, anything must be void which is done by the person who, at that time was not sheriff, unless while he was sheriff he had made such an inception of the execution as made it legal for him to carry the writ so begun to a completion.

Before the sale, the return of the writ and the sheriff's tenure of office had both expired; there is therefore the double necessity for enquiry what was done upon this writ, before Hilary Term, 1839, when the writ expired.

There is no proof that it was advertised; so far as any direct evidence goes, it seems to establish the contrary—the first advertisement of which any account is given, seems to be that of 31st March, 1838. The enquiry is important, not from the necessity of shewing a legal advertisement in all cases, in order to uphold a sale, but for the purpose of seeing whether there was the act of advertising while the sheriff was in office and the writ current, admitting that that could be relied on as an inception of the execution. Looking at the evidence, we cannot say that any such advertisement was proved; and therefore, though I

think that might be such an act as would constitute an inception of execution, it is not important in this case that we should determine the point.

Then, what else is there to rely upon? I see nothing proved to have been done which afforded any reasonable pretence for Mr. Jarvis going on with the writ, either as regarded his interest in respect to his fee for any services which he might have rendered, or on any ground of public convenience whatever. On the contrary it would have been much fitter, I think, that the actual sheriff should have made the sale.

But was anything done before the return of the writ; for if not, neither could have legally sold?

The jury have found nothing more done than taking from Miller a list of lands which he owned, some in Hamilton and some out of it, but all in the same district, and subject of course to the executions which the sheriff, Mr. Jarvis, then held. This list is headed, "lands of Andrew Miller, at different *suits*." The sheriff swore he took it from Miller's information, given to him on the property in Hamilton, on which he was residing, and of which the land now in question forms a part; that he took it, as he thinks, within a week or so of receiving the writ, acting in that respect as was usual with him in similar cases. He swore further, that afterwards, and, as he thinks, on his returning to his office, he added to the list the words "six acres of land in the town of Hamilton, laid out in town lots, with buildings." He knew, he says, that Miller owned the six acres on which he lived, and wanted no information from him on that point, but he merely took down from him the other lands of which he had no knowledge; and the jury find that he thus completed his list before 15th July, 1837, which was while the writ was in force and while he was still in office.

So that we have here the sheriff going with a writ (as may be fairly presumed) which commanded him to sell Miller's lands, entering on premises which he saw him in possession of, and which he knew he owned; and which it was therefore, as we may suppose, in his mind to seize

and sell as being subject to the writ. When we consider that he went to Miller for that purpose, which in the nature of things he must have declared, and took from him a list of his lands, both in the town and out of it, omitting only those which he saw him actually seised and possessed of, and which he new the extent of, and could sufficiently designate without his assistance as being the six acre block in his possession, I think we should in support of the execution which the law favours, and in protection of the purchaser, look upon him as declaring to the defendant, "I come under the authority of these writs which hold I to seize your lands, both those on which I see you living and of which I have knowledge, and any others which you may possess in this district of which I have no knowledge, which lands I shall proceed, in due course, to sell under these writs." That is, I think, the plain construction and effect of Mr. Jarvis' conduct, according to his evidence; and it is as formal an act of seizure as we have any reason to suppose takes place in any or all of such cases.

In *Jones v. Atkinson*, 7 Taunt. 56, the court determined that when a sheriff, having several writs of *fi. fa.* against a debtor, seizes upon one of them, he seizes upon all, so that it is of no moment here that the list makes no mention of this particular writ, and that the sheriff is not proved to have mentioned it.

That some act of seizing is recognized as being usual upon executions against lands, I have shewn from expressions in our provincial statutes; we cannot therefore treat an act of that kind as wholly unimportant and insignificant, and beside the sheriff's duty; and if we were to hold any more formal act of seizure indispensable to the valid execution either of a *fi. fa.* against lands or an attachment, my belief is, that we should be overturning as invalid the great majority of titles which depend on such process.

I incline therefore to the opinion, that enough was done before the writ expired to make it legal for Mr. Jarvis, if he had remained sheriff, to proceed and sell the land after the return. By which I mean this: that if Mr. Jarvis had continued in office, and had taken the steps which he had

sworn he did before July, 1837, he could have proceeded, after the end of Hilary Term, to sell the lands; and if he could have done so by reason of an admitted sufficient inception of the execution before its return, then I do not see that we can, on any clear principle, deny that he could, by virtue of the same act of inception, have gone on to complete the execution, though he might in the mean time have retired from office.

The legal principle is in many books of high authority stated in unqualified terms, that execution is one act, and that he who begins it may complete it, and after the return as well as before. Then our law, rendering lands and tenements subject to the same process for seizing and selling, and in the same manner as goods, I think, if we should make a distinction in this respect, it would be arbitrary, and might lead to the unsettling of many titles which have been hitherto deemed to be good. And this, I think, we are bound to hold, though we may believe that it would be well for the legislature to settle the matter on another *footing* by some positive law. In the meantime I refer to the case of *Bird v. Bass*, 6 M. & Gr. 146, as very materially confirming the view which I take of the consequences of what was done by the sheriff in this case.

But then occurs the very considerable period till March, 1838, before anything further was done, to follow up what I am disposed to treat as an act of seizing. The only effect of that would be, to afford ground for treating the act of seizing as abandoned, especially if another creditor had in the meantime come with another writ, which he pressed to have acted upon in ordinary course. But here is no contest between different claimants on Miller's estate.

All we have to see is, whether what has been done is binding upon Miller. In my opinion it should be held to be so, for on this point of the plaintiff's case the evidence, I think, is strong. Delay was no injury to him. If Mr. Jarvis had acquired and retained a power to act under the process, any indulgence granted to Miller in the way of time should not be turned by him to the prejudice of the plaintiff in the suit, and still less of innocent third parties, who come in

and purchase at an open sale made under the process of the court.

It is true the jury have found that Miller did not acquiesce. "He knew," they say, "what was going on but did not acquiesce." This, I make no doubt, is true in the sense in which the jury meant it; that is, he did not at any time say he was willing that his land should on a certain day be put up and sold to satisfy the execution. He was always interceding for delay; and, for all that appears would sooner they had not been sold till this time. But he was not denying the legal authority to sell; he was only begging for postponement; in other words, proposing that the sale, which he saw advertised, should take place at a more distant day. In every other sense, he acquiesced. His correspondence is before us. We may draw our inferences from what appears there, and it is for us to say what his written declaration and promises and requests amount to.

In his letter to Mr. Jarvis, of 24th November, 1838, he evidently thanks him for past indulgence, which is recognizing a right and power in Mr. Jarvis to have sold before; at least, I think it reasonable so to construe it. Now, Mr. Jarvis, in March, 1838, had advertised this land for sale. If he had no power to sell it then, or before, or when Miller was writing, there was no indulgence in his having waited.

So in June, 1838, after Mr. Jarvis, being out of office, had advertised his lands for sale under the writ, he acquaints the bank (the plaintiffs) with the fact, asks for time, and says a very small delay will save him great loss. About the same time, he writes again to the plaintiffs in the suit, and says, if they will not grant time, he hopes they will send up orders directing *the sheriff* to sell *one lot at a time*, but presses for a few months more. He knew well who had advertised his land for sale; his letter to Mr. Jarvis shews it, and the advertisement made that plain. When he asked them to direct the sheriff to sell one lot at a time, he meant, I have no doubt, the late sheriff, Mr. Jarvis. He does not set up that the land could not be sold under that writ, nor sold by Mr. Jarvis; he only asks for time, and to have the sale conducted in a particular manner.

He is to be supposed, like others, to know the law. He could well have known whether Mr. Jarvis had done any thing or not before July, 1837, which gave him authority to go on and sell; he knew what passed between him and Mr. Jarvis, when Mr. Jarvis took an account of his lands; and I consider that when he communicates with Mr. Jarvis long afterwards about the sale, acknowledges his indulgence, and asks the plaintiff to extend the time for this sale, publicly advertised (as it was by Mr. Jarvis) he is *ipso facto* acquiescing in Mr. Jarvis' right to proceed there to the sale, and when he had obtained a delay longer than he asked for, it is inconsistent to turn around afterwards and say to the purchaser who put faith in a public proceeding, to which he was a party, and of which he did not complain as irregular, that he has paid his money in vain, for that the sale under the writ advertised by Mr. Jarvis, which he had asked to have deferred to a particular time, could never legally be made at all by Mr. Jarvis nor by any one under that trust. He had all the delay which he asked for when he first prayed for postponement, and more; and when at last the sale took place some months after, in his thanks expressed to Mr. Jarvis himself for his indulgence, when he heard of the sale through his agent, the same sale upon which the deed to the lessor of the plaintiff was made, he makes no objection to Mr. Jarvis' want of authority, or to the validity of the sale, but writes if the bank will not suspend the "residue of the sale for a few days and let me know by letter and I will write an answer and say when I will forward them the money *for the balance*," and in the same letter he promises several times to the bank that he will pay the balance.

When he thus promises to "pay the balance," he recognizes the sale; and surely any purchaser acquainted with Mr. Miller's course of conduct, his requests and promises and gratitude expressed to Mr. Jarvis and others for indulgence, would be entitled to believe himself perfectly safe in purchasing at a sale conducted by Mr. Jarvis under an execution, to which and to Mr. Jarvis' authority as derived from it, he was then to all appearance submitting.

The fair inference, in my opinion, from all this is, that the defendant Miller knew well that Mr. Jarvis had, in fact, taken such steps under the execution while it was current, as gave him authority to complete the execution. The first notice which he saw published, must have shewn that Mr. Jarvis publicly proclaimed that he had seized his lands under certain writs. Whether he had done that legally, and in time or not, he could then well know, and in my opinion he should be taken by his conduct to have asserted that there had been a legal commencement of the execution rather, than that we should overturn a sale made after repeated postponements granted at his own request, because the purchaser can not after a space of eight or ten years, prove what took place between him and Mr. Jarvis.

Upon these grounds, and because for all that appears the defendant has willingly availed himself of the payment of his debt, which was accomplished in 1839, only through the sale of these lands, I am of opinion that the verdict which has been given for the lessor of the plaintiff should stand.

It was of no real consequence to the defendant whether the sale were made by Mr. Jarvis or his successor : it is therefore a mere technical question of law. The writ gave command to sell the land, and by consequence authority to do so. In substance therefore, that only was done which the law authorized ; and the question is, was the authority continuing at the time it was executed ? It was, I think, if Mr. Jarvis to whom (in effect) the writ was addressed, (for he was then sheriff) did commence acting upon the execution while it was current.

The defendant must well have known in 1838-9, whether Mr. Jarvis had done so or not, and I think by his whole conduct at the time, he should be taken to have admitted it, and this is independent of Mr. Jarvis' proof from recollection of what he did at the time.

The defendant does not dispute that the whole debt for which the execution issued was justly due ; on the contrary, in his letters he admits that he owed it to the bank for money which they had advanced to him, and he acknow-

ledges their liberality—then it is not pretended that the bank had any other means of obtaining satisfaction than by execution against his lands. Such a process was accordingly taken out and given to the sheriff in February 1837, which might have been acted upon any time before the middle of December following. The defendant was in Hamilton during a great part at least, if not all the time, and as I infer from the letters in evidence, well aware of Mr. Jarvis having the process against him, and of course aware of what had taken place between himself and Mr. Jarvis after the reception of the writ (if anything did take place) and with the same opportunity of being aware that nothing had taken place respecting the seizure and sale of his lands in execution (if that had been the fact afterwards) before any sale; and as I recollect from the evidence, before any advertisement of an intended sale, he withdraws from Upper Canada to Rochester, in a time of public confusion, which might account for, if it could not excuse a good deal of delay and seeming irregularity in acting upon process of this description.

But after he left Canada he finds his lands advertised by Mr. Jarvis, as having been seized by him under this and other writs. He might have known without inquiring what ground existed for advertising the lands as seized: and at any rate he had notice of the fact that they were advertised as seized, and ample time for inquiring into the facts if he did not know them.

Though he was absent from the country, he corresponded with Mr. Jarvis, in relation to the intended sale by him under the writ; he corresponded also with the plaintiff, interceding for delay; he sends messages to Hamilton to ask the same favor, and he has an attorney on the spot to superintend his interest, and with whom he was in correspondence on that very business. One postponement takes place after another at his instance, and during all that time we see and know nothing of any objection to the sale, as one that could not legally be made in the manner proposed, that is, by Mr. Jarvis under the writ. Then when at last the sale is made in March 1839, of this and other parts of

his property in Hamilton, and the sale adjourned for a few days, in the hope of getting at such adjourned sale a better price for the remainder, we find the defendant corresponding with his agent and with the plaintiff in relation to the sale that had just been made, and to the further sale intended, asking only for time, professing his desire to pay the plaintiff "*the balance*" and expressly promising to do so. The *balance* could be nothing else than the portion of the debt which remained after applying the proceeds of the first sale, and it is plain he speaks of the balance in that view, which is taking credit to himself for the proceeds of such sale, and thus adopting it as valid.

Now certainly any person reading his letters at the time, might have gone with confidence to such second sale, and bid under the persuasion that it was a sale which the defendant entirely acquiesced in, in every other sense than that he would have been glad to have got more time if he could, and if the latter sale could have been binding on the defendant, the first must have been equally so. Both were binding, if Mr. Jarvis, before July, 1837, had done anything which we could call an inception of the execution; whether he had or not, the defendant might well have known; and therefore under such circumstances we should assume as against him, that that had passed which would be an inception.

From the 3rd of March 1838, to the 2nd of March, 1839, the defendant had every opportunity to move to stay proceedings on the *fi. fa.* if no sale under it could legally take place. But he comes years afterwards, and without shewing that he has repudiated the sale, or given notice to the purchaser not to pay the price, or to Mr. Jarvis not to pay it over to the plaintiff, and without shewing that he has not in one way or another, received the benefit of whatever the several purchasers had paid, he seeks to regain possession of his land, though his debts, for all that appears, have been paid with its proceeds.

No doubt what is plainly and absolutely void, cannot be made valid by waiver or acquiescence; but where an act may have been regular or not, according as certain facts

may or may not have occurred, of which no record is required to be kept, then when we find a party so conducting himself, as it would be natural and consistent he should do, if these facts did occur, he supplies by his conduct, ground for the inference that what was proper to be done was done.

If Mr. Jarvis can on that principle, as I think he can, or by reason of what was actually proved by him at the trial, be held to have commenced the execution while in office, then I think it would follow that he must in all that was done afterwards for completing the execution, be regarded just as if he were at the time clothed with his official character, for we must look upon all as one act. It is the well settled principle of law; and the consequence is, that the deed afterwards made by him in confirmation of his sale, must be looked upon as made by him as sheriff, and the recitals in it of his acts as sheriff, are entitled to the same respect as if he had been still sheriff when he executed it.

MACAULAY, J.—The first point having been abandoned, the case resolves itself into that of a purchaser at sheriff's sale, under a *fi. fa.* against lands, not the creditor bringing ejectment against the execution debtor. In such an action the *onus probandi* is on the plaintiff, and the first question is, what is it incumbent upon him to prove to entitle him to recover.

That it is not necessary for a stranger, as the lessor of the plaintiff, to prove the judgment, was determined in the case of Doe Button v. Murless, 6 M. & S. 110; but if necessary, it was in the present instance duly proved.

He also produced the original *fi. fa.* which does not appear to have been returned, and no sheriff's return is endorsed thereon. This writ bears teste the last day of Michaelmas Term, 1836, and was issued on the 20th January 1837, in the vacation of that term, and delivered to the then sheriff of the Goré district on the 10th February, in the same vacation. It was made returnable the last day of Hilary Term, 1838. At the time this writ issued Hilary Term was by statute 2 Will. IV. ch. 8, sec. 3, appointed to

begin on the first Monday in February; consequently the return day contemplated by the writ was Saturday the 17th February, 1838. But on the 4th March, 1837, by the statute 7 Will. IV. ch. 1, secs. 6 and 7, the terms were altered, and Hilary Term made to commence on the first Monday in December, and Easter Term on the first Monday in February: and again on the 6th March, 1838, by statute 1 Vic. ch. 15, Hilary Term was made to commence on the first Monday in November, 1838, consequently Easter Term was in point of time substituted for Hilary Term, and the latter term made to begin at a much later period of the year.

The acts making these alterations take no notice of current writs liable to be affected thereby; and as the writ in this case is not expressed to be on the last day of Hilary Term next, but of Hilary Term 1838, which was not in fact the next Hilary Term after the issue of the writ, for the next commenced on the first Monday in February, and had expired before the time was altered, it seems to follow that the return day must be regarded as extended with the alteration of the term, as evinced by the statute 6 Geo. IV. ch. 1, sec. 3 (1825), when express provision was made on the subject.

Looking at this *fi. fa.* therefore as returnable on Saturday the 17th November, 1838, it appeared that Mr. Jarvis, sheriff of the Gore district, having received the writ on the 10th February, 1837, left the office on the 15th July of that year. That before leaving office he entered upon a tract of land of the defendant, in the town of Hamilton, of which that in suit formed a part, in order to inquire of the defendant what lands he owned in his district, and from whose information he made the first part of the schedule given in evidence, and afterwards and off the land before leaving office, added thereto the tract in Hamilton, including the *locus in quo*. That he did not assign over this writ to his successor in office, under the statute 20 Geo. II. ch. 37; but after leaving office, and after the expiration of twelve months from the receipt of the writ, and before the return day, as extended by the operation of the statute 7 Will. IV. ch.

1, sec. 6, he on the 31st March, 1838, advertised the same for sale in a newspaper published in the district, as having been seized and appointed the 30th of June for that purpose in order to allow three months to intervene, according to the statute 2 Geo. IV. ch. 1, sec. 20. It was not published at all in the Upper Canada Gazette, as the law required.

Before the 30th June, 1838, the defendant applied to the plaintiff in the writ for indulgence, and the sale was postponed from time to time, by notice in the newspaper above alluded to, until the 2nd March, 1839, when an attempt was made to sell; but no sale being effected, it was verbally postponed by the sheriff, to the 9th day of that month when the present sale took place. Under the circumstances (of which the above is an outline), the plaintiff claimed to be entitled to recover, on proof of the ex-sheriff's deed, dated the 9th March, 1839.

Of course the principle points are, what it was incumbent on the ex-sheriff to have done to render this a valid sale, and whether he actually did all that was essential to give it validity. Then, is the mere production of the *fi. fa.* and deed sufficient, without more; and if sufficient *prima facie*, can the defendant impeach the sale by shewing that all was not done that ought to have been done, I think he may, except in so far as he may be estopped.

The writ commands the sheriff, of the defendant's lands, to cause to be made the amount of the judgment. The liability of lands held in fee simple, like the present, to this execution, is under the statute 5 Geo. II. ch. 7, which rendered them *subject* to the like *remedies, proceedings and process, for seizing, extending, selling or disposing thereof*, and in like manner as personal estates are *seized, extended, sold or disposed of*. No doubt the writ therefore authorised the sheriff to sell the lands; and if the judgment did not itself operate as a lien upon them, the writ of *fi. fa.* did, from the time of its teste, or at any rate of its delivery to the sheriff.—Gilb. on Ex. 19; 10 Jur. 794-5; 1 Mod. 188; Cro. Car. 450; Bunb. 271. So a *fi. fa.* against goods is a lien upon the goods, and yet a seizure is deemed a necessary

step in order to convert the mere lien into a power to sell, for a lien only, does not include a right to sell; and the statute 5 Geo. II. says, lands shall be subject to the like process and proceedings, &c., as goods. Now goods and chattels are subject to seizure under a *fi. fa.*, so is a term for years, as being a chattel real and personal estate. Lands (including terms for years) may be extended under an *elegit*; they are *seized* and sold under a *fi. fa.* It may be that, owing to the immobility of lands and the nature of the debtor's interest therein, as compared with goods and chattels in the ordinary use of those words, a sheriff may sell lands held in fee, or even terms for years, without any previous levy or seizure, although such levy or seizure be a necessary preliminary in the sale of goods under writs of *fi. fa.*; but if so, I think such sale, to be effectual, must take place on or before the return day of the writ, and not afterwards. But if nothing is done on or before the return day, or before the sheriff leaves the office, when he does so at an earlier period than the return day, I do not think the writ *proprio vigore* empowers him to sell after he ceases to hold the office of sheriff, or after the return day.

At the same time, I entertain the opinion, that a sheriff may acquire the power to sell lands after the return day, and after he shall have ceased to hold the office; but that in such event it is essential that the execution of the writ had been commenced while he was in office, and on or before the return day, so as to bring it within the rule that, being entire, it shall, if once begun, be completed, according to the case of *Clark v. Withers*, 6 Mod. 295; 1 Sal. 323; 2 Lord Ray. 1074; 2 Saund. 47, 344; Willes, 131, 280.

I also think that, however the courts may for reasons of policy be disposed to favour *bona fide* purchasers at sheriff's sales, the maxim of *caveat emptor* so far applies, that any one purchasing at such sale from a person out of office, and after the return day of the writ, must take the onus of proving that such person (whose *prima facie* right to execute the writ thus ceased) had while in office, and before the return day expired, done that which rendered the subsequent sale valid. What that is, forms the first important

question; and upon the best consideration, I think he must prove a previous levy or seizure, by analogy to like proceedings on similar process against goods.

I expressed myself to this effect in the former ejectment between the same parties—see *Doe Miller v. Tiffany*, 5 U. C. Repts. 90,—and after a careful reconsideration of the subject since the last argument, and especially with a view to Mr. Vankoughnet's able argument, that in relation to the lands, unlike the case of goods, the *sale* was of the essence of the execution, and not the *seizure*, I am obliged to adhere to the same opinion still.

There is no doubt an essential difference between lands and goods. The sheriff may not only seize, but dispossess the owner of goods and take them into his own possession and keeping, and after sale he may deliver them to the purchaser; whereas, though he may sell lands, no estate passes until it is transferred by deed of sale or assignment—1 B. & A. 230; 9 M. & W. 372; 1 Dow. N. S. 352; 14 M. & W. 239. And the property is not altered in either lands or goods till the sale—see Yel. 44, (n); Bull, N. P. 41; *The King v. Giles*, 8 Price, 293 to 415; 1 B. & B. 370; 16 East. 254, 278; 3 M. & W. 622; 9 M. & W. 373 14 M. & W. 239; 10 M. & W. 46; 9 Bing. 128, 135, 265, 285, *Giles v. Grover*,—and see pages 163, 177; 10 Bing. 182; 6 Bing. 158; 4 East, 523. Nor will it pass in the case of real estate, until a deed of assignment or conveyance be executed.

The circumstance that no estate in real property passes until a deed of assignment or conveyance be executed, suggests the question, whether the *conveyance* as well as the previous act of sale, should both precede the return day of the writ, or the period of the sheriff leaving office: as to which see 10 M. & W. 360; 14 M. & W. 244-5.

When, however, such assignment is executed, he cannot expel the debtor and deliver possession to his vendee: whose only remedy (unless the possession is vacant, or the possession be voluntarily relinquished) is by ejectment.

That the Sheriff cannot deliver possession of lands like goods, but only seizure or seisin, see *March*, 13; 3 *Keb.*

242; Cro. Eliz. 584; 3 T. R. 292, 8; 6 Taunt. 202; 1 Mar. 514; 1 Dow. N. S. 352,

Still, adopting the analogy of writs of *fi. fa.* executed upon leasehold interests in England, there is in other respects a close resemblance. The sheriff may there legally enter upon premises demised for a term of years, and seize and sell the same. He may return such chattels real on hand for want of buyers; and afterwards sell the same under a *venditioni exponas*, which supposes a seizure—see 8 East 467. He might acquire a right to poundage upon a compromise before sale. He might after seizure be ruled to return the writ, and no ulterior process could be regularly resorted to, without such previous return. If sued in trespass, he could justify the entry, and though the gist of the execution of a *fi. fa.* against goods, be the levy or seizure, and not the sale, yet a sale is necessary to divest the right of property of the debtor, and to transfer it to the creditor or purchaser.—Yel. 45 (n); 16 East, 254; 3 M. & W. 622; 9 M. & W. 372.

Both seems requisite: though the act of seizing may have had its origin in the necessity of applying the writ to some specific goods, in order to prevent there being eloiigned, or subsequent process against the effects of the debtor, from superseding or taking precedence over it. Still it is in practice treated as an indispensable step to warrant a sale.—6 Mod. 295; 1 B. & A. 230; Cro. El. 227; 8 East, 474.

It is that which, in addition to the general lien, applies the writ to specific property, and which being done *pro tanto* at once and before sale, operates as a satisfaction or discharge of the debtor until returned. It has therefore a twofold operation, and is in itself so far an execution of the writ, that being done, the sheriff may afterwards sell, though out of office.

That the sheriff may *complete* executions by *fi. fa.* after the return day or after leaving the office, if once begun—see Rolle's Ab. 893,—4, 458; 6 Mod. 295; 1 Sal. 323; 2 Lord Ray. 1074; Cro. Jac. 73; Yel. 44; Moore, 747; 1 Bur. 20; 1 B. & A. 230; Willes, 131, 280; Lutw. 589; Vin. Ab. Return C.; Cro. El. 512; 1 Ves. Sen. 180–3; 2 Saund. 47, 344; 4

Leonard, 30. And this though a writ of error be brought—Cro. El. 597; 1 Vent. 255; Willes, 271; 1 Sal. 321; Moore 531; Yel. 6; 2 Burr. 812; Saund 101 (c). Or though an act of bankruptcy committed—8 B. & C. 722; 1 Lord Ray. 724; 4 B. & Ad. 255; 1 N. & M. 52.

A seizure of lands would seem equally important to prevent the over-reaching effect of later process, and may be attended with the same effects as a seizure of goods in other respects, and although the debtor cannot be turned out of possession. That a term of years may be seized, either actually or symbolically, as by entry and seizure of the lease, and that on the same principle, lands held in fee may be seized by entry, and a *pro forma* act of levy or the taking of the articles of title, is I think, shewn by numerous cases.—Gilbert on Executions, 19; 4 Co. 74, Palmer's case; 8 Co. 96-7, 171; Cro. Jac. 73; Yel. 44; Moore, 757, S. C.; 1 Ves. Sen. 180, 195; Owen, 70-1; Dyer 363, 373; 3 Ver. 171; Stat. 11 Geo. II. ch. 19, sec. 8; Comyn's, 204; Willes, 131; 2 B. & B. 362; 5 Moore, 79; 1 A. & E. 641; 3 B. & A. 470; 3 T. R. 292; 2 Ch. R. 203; 8 T. R. 57; 5 B. & A. 243; Jacob, 421; 1 M. & S. 425; 1 B. & A. 230; 6 Taunt. 370; 2 Mar. 78; 8 East, 467; 1 M. & R. 137; Comb. 291; 9 M. & W. 372; 1 Dow. N. S. 352; 14 M. & W. 244; 5 U. C. R. 80; 1 Dow. N. S. 352; 3 Tyr. 339.

In 2 Paine and Duer's Prac., New York, it is said that the judgment itself constituting a lien on lands, no act of the sheriff under the execution is necessary in order to make a levy, but he proceeds to sell them without making any entry on the lands.

A distinction will be found to exist between writs of execution—as continuing writs and peremptory writs: of the former kind are writs of *levari facias*, of the latter, writs of *fi. fa.* The former directs the debts to be levied of the profits, and the writs continue and may be in force after the return day for that purpose; the latter requires the debt to be made of the goods and chattels, and must be executed before the return day, sufficiently at least, to bring it within the rule, that being entire, if commenced before such return day, it may be completed afterwards. Some of the cases respect-

ing sequestrations to the hereafter mentioned, notice and explain this difference.

The foregoing references shew that there may be a seizure: and that such seizure must have been made before the return day, and while the sheriff was in office, will be seen by reference to cases of ejectment by vendees of terms for years, claiming under writs of *fi. fa.* or other cases where a title must be proved under such an execution—6 M. & S. 110.

Also in pleadings in cases where it became necessary to justify under such process,—where the entry and seizure are always averred to have taken place by the sheriff, while sheriff, and before the return day—9 M. & W. 372. 1 Roscoe on Real Actions, 166, speaking of the grand cape, says: The sheriff *verbally* seized the lands into the king's hands, 1 Leo. 92. Under the grand cape the sheriff ought generally to seize, *i. e.* seize generally, only without taking actual possession or removing the goods—Noy. 152; Keilw. 117; Jenk. 122; 16 Vin. Arb. 85. When office finds matter for the king by which a common person may enter, in such case, the king shall be adjudged in possession—Per Roll, C. J., Bro. office. West on Extents, 74; Pl. 15, *devant*, &c., cites. 21 Hen. VII. 17; 10 M. & W. 42; 1 Vernon, 58, 248, speaks of laying on the execution; 1 Vez. Sen. 183, speaks of the execution laid on.

A term intervening between the teste and return of the writ will not invalidate it—2 Sal. 700; 2 Lord Ray. 775; 7 Mod. 79; 11 Mod. 50. And after a levy or seizure, the execution must be returned before another issues—Barnes 213; 6 Taunt. 370; 2 Mars. 78; 3 C. & J. 86; 2 Ch. R. 203; 1 Dow. N. S. 83; 8 M. & W. 249; 1 Dow. 30; 2 Dow. 762; 5 M. & W. 274; 8 M. & W. 250.

As to what constitutes a seizure or evidence thereof, see 1 Wil. 44; 8 B. & C. 456; 2 M. & R. 534; 6 T. R. 298, 300; 5 Bing. 10; 2 M. & P. 30-1; 6 Taunt. 202; 1 Mar. 541; 1 M. & S. 711; 9 Price, 95; 5 M. & W. 50; 3 M. & W. 622; 3 Q. B. 701; 6 M. & G. 145.

Manning's Exchequer 57—with respect to seizing of the lands, the sheriff does in fact nothing but return them, as

found by the jury, as in the case of an *elegit* (1 Salk, 209, 6 Taunt. 202) there seems to be no objection in point of law to an actual seizure, provided it can be effected without using force—B. N. P. 104, page 58. The Queen is legally in possession as soon as the extent is returned.

Hartly v. Moxham, 3 Q. B. 701—Lord Denman said that case differed from that of a distress where the landlord asserts that he takes the goods, and thereby acquires an authority and power of control over them: the trespass might not lie if the act was wrongful.

In Bird v. Bass, 6 M. & G. 145—the sheriff's officer and his follower called at the house of the bankrupt, at twenty minutes past ten in the morning, and asked for him; he was not at home, but they waited till he came, which was a little before eleven, when the officer for the first time informed him of his business. The attorney of the plaintiff in the suit, had received a letter containing notice of an act of bankruptcy, about the same hour, and the question was, whether there had been a seizure or a levy before the receipt of such notice. Coltman, J., left it to the jury to say at what time the sheriff's officer entered the house, and whether the entry was made for the purpose of executing the writ, and to prevent the removal of goods, or merely with the intention of waiting till the defendant in the suit should return home, before he executed it; the jury found that it was made for the purpose of executing the writ. On an application to set aside the verdict, as against evidence, Tindal, C. J., said that it was a question for the jury, and that in the absence of proof to the contrary, the entry was *prima facie* evidence of the execution of the writ itself. Maule, J. thought there was evidence of a levying at the time of the entry—not that the mere entry would be sufficient to charge the sheriff as a trespasser or wrong-doer; but it was the duty and business of the officer to take possession under the writ, that when the debtor arrived he did nothing new, except to speak to him, and that the jury might infer he took possession from the time he came into the house. See 3 Q. B. 701, 11 A. & E. 826: Coleridge, J.—There is no execution (of a *fi. fa.*) when there is no levy; 6 M. & G. 191, per

Cresswell, J.—The general rule is that an execution is executed by seizure,—1 N. & M. 189, (b).

For cases of ejectment by sheriffs, vendees of terms for years,—see 6 M. & S. 110; 2 M. & S. 425; Bul. N. B. 104; Sal. 291, 563; 2 Star. 199; Holt. 587; 2 Arch'd. N. P. 425; 1 Dow. N. S. 352; 9 M. & W. 372.

As to goods—see 5 B. & A. 862; 2 D. & R. 1; 1 Q. B. 736; 1 C. & P. 169.

The cases respecting sequestration are material. The nature of proceedings under such writs is stated in 19 Vin. Ab. sequestration; Bac. Ab. sequestration; 2 Bl. Com. 448; 2 Tidd. 1064; 1 Crompt. 459, 345; Wood's Institutes, 608; Bagley's Pr. 258-9; 2 Arch'ds. Pr. (new) 168; 1 Ves. Sen. 180; 1 Mod. 259; 2 H. B. 582; 3 Camp. 447; 6 B. & C. 630; 8 D. & R. 673; 3 Burn's Eccl. Law, 322; 1 P. W. 307; 2 P. W. 622; 1 D. & R. 486; Bunb. 272; 3 B. & P. 321; 3 Swan. 289, 304, (c) 310; 1 Dow. 434; 5 Tyr. 90, and 1 C. M. R. 507, S. C.; 2 N. & M. 227, 5 B. & Ad. 447; 7 A. & E. 898; 9 A. & E. 468; 7 Dow. 146; 10 M. & W. 42.

These authorities will shew that there is a distinction between sequestrations issued out of Chancery, and by bishops under writs of *levari facias*. That to bishops issue writs of *levari facias* as distinguished from writs of *sequestrari facias* and that on writs of *lev. fa.* or *fi. fa. de bonis ecclesiasticis* a sequestration (analagous to the warrant of a sheriff) issues to name sequestrators to levy the debts, &c., of the profits, &c. That such *lev. fa.* is a *continuing* writ, though returnable at a fixed day, and may be executed after the return day. But that until publication of the sequestration, no one's rights are interfered with, and some of the above cases show that where the right to priority has been contested, the test was, which sequestration had been first published. And that publication consisted in reading it in the church on a Sunday, and at the door, or by affixing a copy thereat; also, that such publication answers what in some cases is termed *laying on the writ*.—1 Ver. 58, 248; 1 Ves. Sen. 182; 3 Camp. 447.

The authority and duty of the sheriff under a *fi. fa.* against

lands, must be considered exclusively as under the stat. 5 Geo. II. ch. 7, and irrespective of our subsequent provincial acts, though they may be properly resorted to in aid of the argument.

If a sheriff could, in no case, sell under *fi. fa.* against lands, unless while in office, and before the return day; much inconvenience would be the result. If he must necessarily do so, and the writ is made returnable at a day within twelve months from the time of its receipt by him, he would be justified in returning *tarde*, because our statute prohibits a sale until the expiration of that period. But if not—if though he could not sell, he might lay on or begin the execution before the return day, he might, if ruled, return that he had seized lands to such a value, but had not sold, because the writ had not been in his hands twelve months. Or it may be, that the writ is irregular that has not twelve months between its teste and return, and between the time of its delivery to the sheriff and the return day.

Another case might be, attempting to sell unavailing for want of buyers after being duly advertised, &c.; would it be a sufficient return for the sheriff to say that he could not find buyers before the return day, without alleging any seizure, or shewing a state of things warranting a *venditioni exponas*, but making a return which, if sufficient, would seem to require the plaintiff to issue an *alias* returnable twelve months afterwards.

The case of *Armour and Davis v. Jackson*, Taylor, 146, referring to *Boulton v. Small*, is material. It was not contended there, that the sheriff could not return lands on hand for want of buyers, or that a *venditioni exponas* could not issue thereon. The only objection was the shortness of the period between the teste and return of the latter writ.

Also, *Nicholl v. Crawford*, Taylor 376, which is reported, allowed an *alias fi. fa.* against lands to be returnable within twelve months from the teste.

I see no legal objection to a sheriff's taking possession of vacant lands under the writ, and preserving them from waste, or bringing actions against wrong-doers, founded merely on his right as sheriff under the writ. It seems to

me that by entry, he would acquire the same interest and control over lands (except actual possession when retained by the debtor or another), that he acquires by a seizure of goods under a *fi. fa.* and that if in possession, he may deliver such possession to his vendee.

Upon the best consideration, I think that, if a sheriff, before leaving office and before the return day, takes proceedings under *fi. fa.* against lands, which constitutes an overt act towards execution, equivalent to seizure of goods, sufficient as between the creditor and the debtor, as by entry, with the declared purpose of seizing, taking possession of the title deeds, or adopting some other symbol, as laying hold of the knocker of the door, the limb of a tree, &c., acts usual in giving livery of seizure in feoffments, *which* I consider would be a laying on of the execution, that he may proceed to advertise and sell afterwards, though out of office, and after the return day, if nothing had occurred, as lapse of time or other circumstances, to shew such incipient step to have been abandoned, as was held to have been done in the case of *Doe ex dem. of Young v. Smith*, 1 U. C. R. 196.

If the foregoing be a correct view, then the remaining questions are, whether the ex-sheriff Jarvis did, while in office, seize or do that which was equivalent thereto, or evidence thereof; and if so, whether it was abandoned afterwards. I think that, if there was a levy or seizure, the circumstances in evidence sufficiently shew that it was not abandoned.

Then with respect to the seizure, it seems to form a mixed question. If he entered, not meditating any proceeding against these lands, but merely to inquire of the defendant what land he had, and took a note of these as returned by him, it would not be a seizure; but if he entered knowing the lands to be the defendant's, and with intent thereby to commence the execution, if he entered on these lands as defendant's, and also so entered in order to enquire of other lands, it would be evidence of a seizure. The question is, whether he seized or not that is evinced by, and to be gathered from overt acts,—*Bird v. Bass*, 6 M & G. 145,—if he entered with that *animus* it would be a seizure if *alio*

intuitu it would not: if with a two-fold object, both including the execution of the writ, it would; and being equivocal,—what the ex-sheriff did, and *quo animo* he acted in what he did, are for the jury.

If they are satisfied the entry was under and in execution of the writ against those lands as well as others, it would be a levy or seizure; but he merely noting them at the foot of the schedule afterwards, would not. It is of no value otherwise than as affording evidence of the *animus* with which he entered, as it seems distinctly stated he did: a fact not denied by the defendant.

It was not left to the jury exactly in this way, but they seem rather to have found the facts specially as to what the ex-sheriff did, apart from and without noticing his intentions in relation to these lands. I think the evidence warranted the inference, that the ex-sheriff did by actual entry seize or levy on these lands with the defendant's knowledge while in office, and long before the return day, and that such incipient proceeding was duly kept alive until the sale, and if such is to be taken to be the meaning of the verdict as found—deeming it warranted by the evidence, I think such verdict for the plaintiff should stand.

The following tests may be suggested:—

1. In the event of a compromise, was the ex-sheriff entitled to poundage or fees in lieu thereof, under the stat. 9 Vic. ch. 56? See 11 A. & E. 826; Colly v. Coates, 8 M. & W. 249.

2. If ruled to return the writ, could he have returned truly that he had taken the lands which remained on hand for want of buyers?

3. Could the defendant have ruled him to return the writ according to 7 Taunt. 5?

4. Could the plaintiff have issued other process without the previous return of this?—2 Salk. 700; 2 Lord Ray. 775; 7 Mod. 79; 11 Mod. 50.

5. If sued in trespass for the entry, would he be liable on this evidence under the plea of not guilty?

6. If so, could he justify the entry as under the *fi. fa.* while in office? &c.

7. Would a subsequent writ of error have operated as a *supersedeas*?

8. Is the case within the rule of entirety according to Clerk v. Withers, 6 Mod. 395 ? &c.

There is, I think, evidence sufficient to warrant a jury in finding on all these points in favor of the ex-sheriff—in other words, of the lessor of the plaintiff.

DRAPER, J.—I have the misfortune to from differ the rest of the court; and notwithstanding the unfeigned respect I entertain for the judgments of my learned brothers, the reasons advanced by them have failed, after repeated consideration, to bring me to agree in their conclusion.

It is laid down that an execution is an entire thing, and cannot be separated after it is begun. The old sheriff is bound and compellable to proceed and sell on a *fi. fa.* whereon he returns goods levied and remaining on hand for want of buyers, though he goes out of office immediately after making such return.—Clerk v. Withers, Salk. 322 ; Ayer v. Aden, Cro. Jac. 73 ; Charter v. Peele, Cro. El. 597 : Melton v. Eldrington, Dy. 98 (b). The same sheriff who begins the execution ought to end it; and a writ of *distringas nuper vice comitem* lies either to sell and bring in the money, or to sell and pay the money, to the new sheriff, his successor. When a sheriff has once seized goods, he is compellable to return the writ, and thereby make himself liable to answer for the value of the goods he has so seized: and by such seizure of goods into the sheriff's hands depriving the execution debtor of their custody, the property is for the time being at all events divested out of him; though this holds only as to chattels which pass by delivery, and not to chattels real, terms for years, which remain in the debtor until a deed of assignment is executed by the sheriff. If the debtor were to die in the interval between the issuing of the writ and its execution, the creditor's title to the goods would be paramount to that of the executor: and as to goods, the sheriff may maintain trespass or trover against any person who takes them away after he has seized them in execution; and the defendant is discharged from the judgment and all further execution, if the sheriff has seized

on goods to the amount; and such a seizure will be a bar to a *sci. fa.* on the judgment, as well as to any action on the judgment, and the plaintiff is put to his remedy against the sheriff; and if the sheriff has seized goods, and returns that he had done so to the value of, &c., and that the goods were afterwards rescued, this will not excuse him; it was a fault in him, and he remains liable for the value returned.—Doe Hughes v. Jones, 9 Mee. & W. 376; Playfair v. Musgrove, 14 Mee. & W. 239; Ranken v. Harwood, 10 Jur. 794; Wilbraham v. Snow, 2 Saund. 47; Mountney v. Andrews, Cro. Eliz. 237; Atkinson v. Atkinson, Cro. El. 391; Cook v. Wilmot, Cro. El. 209; Mildmay v. Smith, 2 Saund. 343; Sly v. Finch, Cro Jac. 514.

From these and many other authorities, it is clear, that the seizure of the goods, and not the mere receipt and filing of the writ, is meant by "*beginning execution*;" and that although the sheriff has the writ, yet if he seized no goods under it, and is removed before it is returnable, execution should be done by his successor.—See Meriton v. Stevens, Willes, 280, and the cases there reviewed; Dyer, 41 (b) in margin, and 355 (a) in margin; 3 Salk. 147.

The distinction suggested, as between goods transferable by delivery and chattels real, which require assignment by deed, applies with equal force as to lands held of freehold. See Morland v. Pellatt, 8 B. & C. 722; Doe Hughes v. Jones, 9 M & W. 372; Playfair v. Musgrove, 14 M. & W. 239. In terms for years, it appears customary to seize *the lease*; but there can be no doubt the sheriff can seize and sell *the term*, though he cannot get possession of the lease, or where it is a term created by parol. When goods are seized on a *fi. fa.*, the sheriff deprives the defendant of the possession at once; not so of a term, as Doe Hughes v. Jones shews *a fortiori* not of an estate of a freehold. On an *elegit*, the sheriff can do no more than deliver *legal* but not actual corporeal possession. Though the sheriff may maintain trespass or trover with regard to goods seized, it is nowhere pretended he can maintain any action with regard to a property in which he is about to sell and does afterward sell a term; though perhaps he might sue for the lease, if he

had seized it, and it were taken from him. It is clear to me, that if the debtor or any person cut timber or committed any waste to lands, after the sheriff had received a *fi. fa.* against them, at any time before the execution of the deed to the purchaser, the sheriff could maintain no action. I do not find that, on any writs against lands in England, the sheriff ever entered or put a party out of possession, unless the command of the writ was "*habere facias possessionem, or seisinam.*" Even on a writ of *grand cape*, which commands that the lands in question be taken into the hands of the King, no actual entry, no dispossession of the tenant takes place.—*Mitchell v. Hyde*, 1 Leon. 92; *Atkins v. Gage*, Noy. 152; *Anon. Keilw.*, 117 (a). It is a mere formal proceeding; and the court condemned a sheriff who, under a writ of *grand cape* against a rectory, entered and took and carried away certain tithes, saying he ought to have seized generally, but to have left them where he found them. And upon an *elegit*, the sheriff summons a jury, ascertains by their verdict what lands the defendant has and the value, and divides them; and on returning this inquisition, returns further that he has delivered the moiety to the plaintiff. And he has thus done all that the writ authorises, though he has made no actual delivery, and though to obtain possession, the plaintiff may be driven to an ejectment. So on an inquisition on an extent, the sheriff returns that he had seized into the King's hands the lands found by the jury to belong to the defendant, though in fact he only seizes in law. The statute 3 Geo. 1. ch. 15, sec. 9, proves, that notwithstanding the seizure of goods by a sheriff, on exchequer process for the king's debts, a writ of *ven. ex.* went to his successor for the sale thereof. On writs of *fi. fa.* against goods, if the sheriff sell the lease or term of a house he cannot put the person out of possession and the vendee in.—*Rex. v. Deane*, 2 Show. 85; *Taylor v. Cole*, 3 T. R. 295. He may, if he can, seize the lease as part of the chattel real, and may deliver that, but not possession though the vendee may enter *if he can peaceably obtain possession*. Though a writ of error is brought and a supersedeas issues, yet, if the sheriff has actually seized goods,

he must or at least may, sell; but the reason seems to me to have no application to lands. The sheriff perhaps might be authorised under the *fi. fa.* against lands, to seize title deeds, and so be said to commence execution; but admitting this, and that he could do so within the twelve months, it is far from being a consequence that he *must* seize the titles before he can sell the lands. To hold this would in most cases defeat the execution.

The provincial statutes 43 Geo. III. ch. 1, sec. 2; 2 Geo. IV. ch. 1, s. 20, prevent a sale until twelve months from the day the sheriff receives the writ, and require an advertisement six times in the Upper Canada Gazette, and an advertisement in a district newspaper, or a written notice put up in the office of the clerk of the peace, or on the door of the court-house, for three months before the sale. Nothing else is prescribed; and at the expiration of the twelve months, the sheriff's duty is to sell and on receiving the money to execute a proper assignment of the debtor's estate and interest in the lands sold to the purchaser, without which the estate would still at law remain in the debtor.

The whole authority to sell lands is derived from 5 Geo. II. ch. 7. At common law, the writ of *levari facias* authorized the sheriff only to collect the debt from the issues and profits of the lands, and from the sale of the goods; in other words, to levy the corn and other present profits which grew on the land and the rents payable by tenants, and sell the moveables. The writ of *elegit* was given by statute—as also was the recourse against lands—under a statute merchant, a staple statute, or a recognizance in the nature of a statute staple. It is clear, that the statute 5 Geo. II. does not alter the nature or legal character of real property. For the purposes of this case, it would be immaterial if that statute converted land for the purposes of execution, into chattels real; and it would be, I think, impossible to contend that its operation went farther. Even then the sheriff could not enter or make an actual seizure of the chattels real—of the land leased; though he might, as already observed, have entered and seized the lease: and even then would be a trespasser if he remained an unreasonable time

on the premises (*Playfair v. Musgrove*.) The sheriff could still transfer only a right of entry and enjoyment, as under an *elegit* or a *fi. fa.*, when a term was sold. And as regards land, he could not in all cases give a *present* or immediate right of entry; for it is easy to put cases when the purchaser at sheriff's sale, after a conveyance executed to him, would not be entitled to enter, and where consequently the sheriff could not justify an entry for any purpose. Such would be the case where a remainder or reversion in fee was sold during the currency of some previous estate. It is true that the common form of expression, as to a term of years sold under a *fi. fa.*, is, that the sheriff *has seized it*. The term itself is not capable of corporeal seizure, though the lease or deed by which it is created may be. It is not, however, meant that such lease or deed is seized, for that is no indispensable step to the executing the *fi. fa.* The sheriff no more seizes the term than he delivers possession of lands under an *elegit*; he does both in law—neither in fact. And it is not necessary he should do more; for by such seizure in law, and by the subsequent sale and conveyance, the right and estate of the debtor passes. And the land cannot be conveyed away in the interim; and so any analogy with goods which might be removed beyond the reach of execution, fails. For if the lands are not bound by the judgment (which I guard myself from admitting), they are at all events bound by the writ, and remain so, though they cannot be sold by the sheriff for twelve months after its receipt.

Thus it appears to me, that the sheriff could do no act, antecedent to sale and conveyance, which would *divest* the debtor of his estate and interest in lands; none in fact which would operate, as in the case of goods, to *discharge* the debtor on the judgment, and compel the creditor to look to the sheriff and not to the debtor for satisfaction. Nor does the sheriff acquire a right to poundage until he makes the money according to our statute 7 Will. IV. ch. 3, sec. 32, though he may be entitled to fees for services actually rendered. Our statute only affirms the law as laid down by Coleridge, J., in 11 Ad. & El. 825: "There is no execution where there is no levy." A doctrine which is con-

firmed by Parke, B., in *Chapman v. Bowlby*, 8 M. & W. 250, who treats the sheriff's right to poundage as the test whether there has been any levy.

If there be any act *necessary* to be done by the sheriff, antecedent to sale and conveyance, it must be the *duty* of the sheriff to perform it, and the neglect of such duty would be a cause of action against the sheriff. Putting aside for the moment the question of advertising, of what omission could the sheriff be guilty during the twelvemonths that the writ must lie in his hands, for which he could be sued? I can discover none; and am therefore confirmed in the view, that during that period he can do no act which would, in the sense of the term I am referring to, be a commencement of execution.

Then if it was not competent for the sheriff to make any actual seizure, and if his letting the writ remain without doing any equivalent act upon it until twelve months from its receipt had elapsed, was no wrong in him, and could not prejudice any one, can the sheriff in any merely formal way, during those twelve months, commence executing the writ? Two matters have been suggested in this case. 1st, The going to the debtor and obtaining a list of his lands. 2ndly: The advertising. Taken together, and assuming them done while the old sheriff was in office, the lands are not the more in the sheriff's hands, nor the more bound to the satisfaction of the judgment, nor less in the possession of the debtor, than before.—See *Dr. Drury's case*, 8 Co. 143 (a). Taken separately, what do they amount to? As to the first; if after the list made as proved, a writ of error was allowed, and a supersedeas in the form, "that if the judgment be not executed before the receipt of the supersedeas, the sheriff is to stay from executing any process of execution before the writ of error is determined," came to the sheriff's hands, would be, as in the case of an actual seizure of goods, be justified in selling and conveying the lands. Could this taking a list be pleaded in bar to a *scif.*, or to an action on the judgment? I think clearly not. But if not, then the execution is not thereby commenced in that sense, which alone authorises or compels the officer

commencing to complete, and it is in that sense only that I am treating the question. Can the taking a list of defendant's lands give the sheriff any special property in them, or enable him to maintain any action concerning them? I can find no reason for an affirmative answer to this question. But if not, how can it be deemed a commencement of execution. As to advertising, it seems clear it was not done till long after Mr. Jarvis had ceased to be sheriff, and therefore need not be considered for the purpose of determining in this case whether it is a commencement of execution.

The sheriff's deed conveys the judgment debtor's title to the land to the purchaser, by way of execution of a statutory power, and it vests (as I think) that title in the purchaser from the day of the sale, the conveyance having relation back to the sale. At all events, I do not see how it can have any relation farther back than the sale, so as to give the purchaser any right of action on matters existing or happening antecedently. If the sheriff acquires no special property and can maintain no action—if the purchaser acquires by the deed no right antecedent to the sale—then, for all purposes till sale, the land, though bound for the purposes of the execution, is the judgment debtor's; and up to the time of sale he, and he only, has any authority over or right of action in relation thereto.

These various considerations lead strongly to the conclusion that, inasmuch as the deed is the final execution of the power to sell, and as the sale and deed together convey the debtor's estate and interest to the purchaser, the party by whom the sale is made must at that time be clothed with the power, which can only be the case if he fills the office of sheriff at the time of sale. For the power in its inception is given to the officer only; he cannot alter its character, or his own position, or the liability of the debtor, by acquiring any *quasi* interest in the subject matter upon which the power is to be exercised, as he may in the case of goods. If therefore, it is held that, having been officer at the time of sale, he may afterwards execute the proper instrument evidencing such sale, and that such instrument shall have relation to the time of sale, a simple and (as appears to me)

a safe rule will be laid down for the guidance of the sheriff in executing writs against lands, and a rule which will not be inconsistent with the principle of any decided case.

For the decision of this case, however, it is not necessary to go so far, since Mr. Jarvis ceased to be sheriff many months before he advertised; and admitting, for the argument's sake, that by advertising a sheriff renders himself liable to the charges thereof, as acts necessary to be done towards executing the writ, and therefore ought to be permitted to complete what he has thus begun, in order to reimburse himself, this admission will not help the lessor of the plaintiff.

It has been suggested in the argument, that unless the sheriff can do some notorious act, as of seizure, or of a commencement of execution, which will give validity to his future acts, completing the execution after he has gone out of office, that he must sell while the writ is current, or the proceeding will be void for want of due commencement while it was in force. I have not been able to satisfy my own mind that this consequence would follow; that, in short, the want of power in an ex-sheriff to execute a writ received while he was an officer, necessarily establishes a want of power in him had he continued sheriff to complete the execution after the return day of the writ. I must recur to the distinction between goods and lands as the subjects of execution, and the mode of dealing with them in execution, which I have already endeavoured to point out. I have not yet found a case in which—in relation to a term for years (the nearest analogy I can discover in English authorities), the court have held the same language as in *Bird v. Bass*, relative to goods and chattels, that a levy is an execution executed. I think I understand what the court mean by the use of the terms so employed. They certainly do not import that the sheriff's duty was *completed*, though they do import such a change in the property by executing the writ on the chattels seized, as to divest, pending such execution, the property out of the debtor. If such an effect, such a consequence, can result from any act the

sheriff can legally do as to lands; in other words, if the sheriff can levy on lands in the same actual manner as he can upon goods, then I shall abandon my present views. But I have failed in perceiving that he can do so. And unless he can, so as to render himself liable to the execution creditor, and to discharge the execution debtor in a corresponding degree, I do not see how any act prior to sale can render it *necessary* for him to complete the execution by sale and conveyance after he goes out of office: though by seizing generally, as the court say with regard to a writ of *grand cape* while the writ is in force, he may amply sustain a completing the execution by sale and conveyance afterwards. I can feel a palpable distinction between acts, which render the completion of execution by the same individual necessary, though he has ceased to be the officer, and those which will justify the officer in completing the execution of the writ after the return day. And if resort be had to the argument *ab inconvenienti*, a reference to the powers of the court over late sheriffs—the limitation of time within which they can be attached—the increased risk of the creditor whose only dependance is on the solvency of the officer—and on his possibility of resorting to his sureties—will suggest abundant reasons for a conclusion that the incumbent and not the late sheriff, should be held to be the proper officer to carry into effect writs against lands, wherever by law it can be done.

Then has the conduct and the letters of the defendant, the execution debtor, altered the case, and given authority and efficiency to act, which otherwise would have been inoperative? The finding of the jury with all the evidence before them, establishes that he did nothing to confer on Mr. Jarvis any power beyond that which he derived from the writ, but acted in the belief that the proceedings taken were according to law, and would if completed divest him of his estate. The whole tenor of his conduct and his letters shew a desire to postpone the sale, in order that he might have time to raise the money, and by satisfying this debt, prevent a sale altogether. I cannot doubt but that if he had been advised Mr. Jarvis' proceeding was illegal—he

would have availed himself but too gladly of the information to obtain the delay he was so anxiously seeking, instead of soliciting it from the plaintiff in the suit against himself. All that his acquiescence in the sale amounts to, is I think, referable to his belief that the proceeding was legal, and that he could not therefore dispute it.

The rule of law precludes any party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, from disputing that fact in an action by or against the person whom he has himself assisted in deceiving.—*Pickard v. Sears*, 6 A. & E. 474; *Gregg v. Wells*, 10 A. & E. 98; *Harrison v. Wright*, 13 M. & W. 820; *Coler v. Bank of England*, 11 Ad. & El. 437.

Thus, if a person having a right to an estate, permit or encourage a purchaser to buy of another, the purchaser shall hold against the person who has the right, which is recognized as a sound principle in *Sandys v. Hodgson*, 10 Ad. & El. 476. Many cases shew the application of the same principle as to personal property. And in the application of this rule, the result is the same—if the admission has been acted upon, whether it were true or false, or was made by mistake or intentionally.—See *Howard v. Tucker*, 1 B. & Ad. 712; *Harding v. Carter*, Park on Ins., 4.

But the admission must have been acted on, or the situation of the opposite party must have been prejudiced or altered in order to its being conclusive of the fact against the party making it; and it cannot be applied beyond the parties to whom it was made, and whose conduct was influenced by it.—*Lackington v. Atherton*, 7 M. & Gr. 360.

This is illustrated by the case of *Heane v. Rogers*, 9 B. & C. 577, when on trover brought by the plaintiff, against whom a commission of bankruptcy had issued against his assignees, it appeared that plaintiff had assisted the assignees by giving directions as to the sale of goods, and that after the issuing of the commission, he gave notice to the landlord of a farm he held, that he had become bankrupt and was willing to give the farm up, and the landlord received the lease and possession of the premises; it was held that

he was not estopped from bringing this action against the assignees, as having assented to the sale, or by giving up his lease—the assignees being neither parties nor privies to that transaction.

As far as appears, the defendant's conduct could not have influenced, for it was not known to, the lessor of the plaintiff. It was not acted upon by him, nor was he induced to become a purchaser, and so to become prejudiced thereby; he was neither party nor privy to the application for delay made by the defendant. The case is clearly distinguishable from that of *Doe. Harley v. McManus*, as the defendant took no part in the sale, or used any means expressly or tacitly to promote it.

The mere application for time, is not a waiver of an objection to a previous proceeding.

The case of *Hayward v. Phillips*, 6 Ad. & El. 119, clearly maintains this position, besides being otherwise important for the decision of this question of waiver or acquiescence. A cause was referred to arbitration and all matters in difference. There were four issues, on the first of which only a verdict for plaintiff and 10*l.* damages was taken: as to the others, there was no authority to the arbitrator to order a verdict. This he however did, and awarded damages, including the 10*l.* on the first issue; he also awarded the defendant to pay a further sum of 20*l.*, and that plaintiff should expend 193*l.* 6*s.* in repairs, for which purpose he was to have power to enter on the premises in defendant's possession. The award was set aside, although it was urged that the defendant had acquiesced in it, and so waived the objection:

1st. By permitting the plaintiff to enter and perform the repairs.

2nd. By attending the taxation of costs on entering the judgment, without raising any objection.

3rd. By applying for a week's delay in issuing execution on the judgment, which was agreed to if defendant would waive the necessity of a personal application for the 20*l.*; a condition to which defendant did not reply; but at the expiration of the week took out a summons to stay

proceedings, in order to move to set aside the award, which summons was discharged and execution issued.

An express consent will not confer jurisdiction on a sheriff in England—and by analogy on the judge of the district court here, to try on a writ of trial a matter not within the jurisdiction given by the statute. Nor is the plaintiff who takes out the writ of trial precluded from urging the objection.—*Lawrence v. Wilcocks*, 11 A. & El. 941; *Edge v. Shaw*, 5 Tyr. 1127.

In *Brock v. Jennings*, 2 Q. B. 265, justices of the peace had made an order on plaintiff to cut and prune a hedge, so as to let sun and air into a highway. He did partially cut it, but not doing so sufficiently, the surveyors went on and did it, and he brought trespass against them. They justified under the order, which he contended was invalid for not sufficiently defining what he was to do. The court sustained his objection, though it was urged that his partial obedience to the order, had precluded him from taking the objection.

Now, comparing the different cases cited, I cannot find that the decisions in them go the length which must be gone if the sale here is upheld on this ground. For the defendant's importunities, and those of his agents or attorney, all went to one object, viz.—gaining time in the evident hope of thereby preventing a sale. He cannot, I think, be truly said to have promoted the sale in any way, or by any act of his to have invited or induced purchasers. It does not appear, nor do I see any reason to surmise—if it would be right to indulge in surmise—that his applications were disclosed by the plaintiff, or that in fact, any doubt as to Mr. Jarvis' authority was suggested, which rendered an enquiry as to the defendant's conduct in the matter even probable. The plaintiffs directed the sale, because they choose to exercise their right to enforce execution against the wish of the debtor. Mr. Jarvis sold because he supposed the writ gave him authority, and the lessor of the plaintiff bought because he thought the proceedings were regular. Not one of them that I can see, was influenced by any *implied* admission of the defendant, or any influence as to the pro-

ceeding being acquiesced in by him: while the verdict expressly negatives any direct consent to waive objections to irregularity or defect of authority.

On the whole, it appears to me, that Mr. Jarvis was not warranted in selling these lands after he ceased to be sheriff, by reason of any act done by him while sheriff: for he could only be warranted in completing execution after he had gone out of office, by having done some act which changed the rights or liabilities of the execution creditor or debtor, or which attached some liability for the debt on himself. I also think that there is nothing proved in the conduct of the defendant to prevent him urging this objection.

I think, therefore, the defendant is entitled to judgment on this motion.

Per Cur.—Rule discharged; postea to plaintiff.

DRAPER, J. *dissentiente*.

BEARD, ADMINISTRATOR OF MARVIN, v. KETCHUM.

An *express* promise to pay, made by the defendant to a third party, a stranger, may enure to the benefit of the plaintiff an administrator's *de bonis non* with the will annexed, though at the time of such promise, the plaintiff had not obtained letters of administration.

(See this same case reported in 5 U. C. R. 114.)

The question of the plaintiff's right to recover in this action, arose on the 8th, 9th 10th and 11th counts, in which four promissory notes were severally declared on. They were all described as having been made by the defendant, payable to Ozias Marvin, with interest: one of them on demand, the others at periods not long after their date. Two of these notes were made in 1796, and two in 1797. Both the defendant and Marvin, the payee, were then living in the United States of America, where Marvin died in 1807, leaving a will, of which one Lockwood was executor.

Lockwood died in 1830, from which time to the 23rd of January, 1847, when the plaintiff obtained letters of administration in Upper Canada, there was no one representing the estate of Marvin.

The defendant removed to this province very soon after making the notes sued on, and has ever since resided here.

The plea of *non assumpsit modo et forma* as applied to the

8th, 9th, 10th and 11th counts, was the issue upon which the case turned at the trial. To support the counts upon that issue, it was necessary to prove a promise to the plaintiff *as administrator*. If such promise were proved, then the plaintiff would be clearly entitled to recover—otherwise not. To prove the promise to himself as administrator *de bonis non* of Marvin, the plaintiff relied upon admissions and promises made by the defendant, not to him the plaintiff personally, but to a grandson of Marvin who was examined as a witness at the trial, and who swore that on three several occasions in 1842, 1844 and 1846, he came into this province from the United States to see the defendant, and to endeavour in behalf of those interested in the estate of Marvin, to obtain payment of those notes, or rather of the balance due upon them, for something had been paid on account by the defendant before he came to Canada.

There was no doubt that what this witness swore to, as having passed between him and the defendant on these occasions, and particularly on the last, amounted to an unequivocal acknowledgment of the debt, and to an express promise to pay it. Such as must without any question have entitled the plaintiff to recover upon the issue raised on the promise to pay him as administrator, if the same conversation had taken place between the defendant and him, after he the plaintiff had obtained letters of administration to Marvin's estate.

The question was, whether the promise to pay could avail for the purposes of the action, being made, as it was, not to the plaintiff himself, but to a stranger, (for no privity was shewn to have then existed between the witness and any one representing the estate of Marvin,) and made at a time when the plaintiff had in law no connection with the estate of Marvin, and when there was in fact no legal representative of that estate either in the United States or in Canada.

The jury found that the defendant did absolutely promise to the witness that he would pay these notes, or rather what remained due, after certain admitted credits were deducted; and the evidence was ample to support that finding.

The witness to whom the promise was sworn to have been made, had the notes in his possession, and shewed them to the defendant, and he also produced them at the trial. Lockwood, the executor, had, in 1816, given a power of attorney to the witness's father, who was a son of Marvin's, to collect these notes; but nothing was done under that power during Lockwood's lifetime. He died in 1830, and then many papers of Marvin's came into the hands of this witness, who had transacted various matters of business in the United States, for persons interested under the will, and in 1842, he first came into this province to hunt up the defendant and endeavour to obtain payment from him.

This was the account given by the witness of the position in which he stood when those conversations took place between him and the defendant, which were relied upon at the trial, for proving the defendant's promise to Beard, the plaintiff, *as administrator* of Marvin, to pay him the amount due.

Upon the first trial, the promise mainly relied upon was accompanied by a desire expressed by the defendant to refer to a third party before he would come under any absolute engagement to pay, and it appears necessary to have this apparent condition or qualification of his promise more satisfactorily explained than it was by the evidence then given, which was one of the reasons for which we granted a new trial.—See 5 U. C. R. 114.

The case now stood upon proof of a plain unequivocal promise to pay the debt; and the only question was a purely legal one, whether that promise made in the manner it was could be treated as a promise made to the plaintiff as administrator.

Cameron Q. C., moved for a nonsuit or for a verdict for the defendant, or to reduce the verdict. *Bell* shewed cause. The authorities cited were the same as those given in the previous report of the case after the first trial,—5 U. C. R. 114.

ROBINSON, C. J.—The statute of limitations has nothing to do with the case, stale as the demand is; for the promises relied upon, were clearly within six years, and the defendant had only to submit, or to deny them as he has done

Any reference therefore to decisions which had taken place on the statute of limitations, can only be for the purpose of reasoning from analogy as to what amounts to a promise, to whom it must be made, and whether the administration when granted, will relate back so as to enable the administrator to avail himself of a promise made before the administration was committed to him.

The plaintiff's counsel on the last argument referred us to the case of *Murray v. The East India Company*, 5 B. & Al. 204, and seemed to imagine that it might have escaped our attention when the case was first before us on the application for a new trial: but that is not so. It was among the cases noted and considered by me, though it was perhaps not alluded to, because having felt it right to grant a new trial, in order to have certain points more fully ascertained, we did not go at that time into a particular consideration of the main point on which the case at last turns. But the decision in *Murray v. The East India Company* cannot assist us in determining the question before us, for it only established that when the payee of a bill died before it was accepted, and there had been no administration granted till after the bill was payable, the statute of limitations did not begin to run either from the defendant's acceptance, or from the day of payment, because there was then no person in existence who could acquire a right of action by non-payment, but that it commenced to run when the administration was granted.

The question raised in that case does not apply here, there being in regard to these four counts no issue raised upon the Statute of Limitations. The principle on which that decision was founded has an apparent bearing against the plaintiff, but none in his favour. I do not think that it has any material application here.

If we were considering whether, in the absence of any express promise to the administrator, an implied promise to him could be raised by law from the mere admission of the debt, then that case would be a material authority, as shewing that there was no cause of action complete in the lifetime of the testator, and consequently no ground for

raising the implied promise to him, which, according to the case of *Timmis, Executor, v. Timmis*, 2 M. & W. 720, it would be necessary to shew, before it could be admitted that there could be any *implied* promise to pay the executor; for I take that case to determine, that if the cause of action has been complete in the time of the testator, there can be no implied assumpsit in respect of the same debt to pay to the executors, and that they can only claim as representing the right of action upon the assumpsit to the testator, or upon an express promise made to themselves, which express promise must be proved, where a promise to the executor is relied upon.

How far this doctrine is reconcileable with the language held by the court in 10 Big. 480; 6 Mod. 309 note; 1 Lord Ray. 421; 11 Mod. 37; 1 Salk. 29; 5 Mod. 425; 3 E. R. 409; 6 Taunt. 210; 6 B. & C. 609; 9 D. & R. 43; and in other cases, we need not now consider. But taking the law to be that an express promise was necessary to be proved in this case, it was proved and has been found by the jury provided it can enure (made as it was) to this plaintiff as administrator. So that it is upon that question that the case must turn.

Before stating my opinion upon it, I will remark, that there is nothing in the circumstances of this case which need press upon one's mind with any force, as producing a conflict between the actual justice of the case and the decision, whatever it may be, which a dry examination of the legal authorities may seem to conduct us to. For on the one hand there has been a remarkable remissness, on the part of the holders of the securities, in advancing their claim. There are some instances in our books of very stale demands being advanced on simple contract debts, but I have met with none quite so stale as in this case, where a plaintiff comes after the lapse of fifty years to claim principal and interest, upon notes of hand against a person who has been living stationary and possessed of property, which there could have been no difficulty in finding; and it does not seem that there could have been any real difficulty in tracing him. On the contrary, from some things in evidence,

I infer that it was well enough known very many years ago that the defendant had removed to Canada; and under such circumstances a plaintiff, coming with a claim upon notes of hand with fifty years' interest upon them, comes with a claim which courts of justice are not disposed to favour; and if he should fail in enforcing his demand at so late a period, he would not in general be thought entitled to much sympathy.

On the other hand, the demand in this case happening to be upon notes of hand under the signature of the defendant, who is still living to explain and give an account of his transactions, their genuineness is proved and is not disputed; the defendant could hardly fail to know whether he has paid them or not; and instead of pretending that he has, he is sworn to have acknowledged most clearly, within a recent period, that the notes are, with the exception of a small admitted payment, still unpaid, and has made unequivocal promises to pay them.

We have to consider, besides, that the express promises proved upon the trial are not in any manner denied by any affidavits filed by the defendant on moving against the verdict; so that we may take him to acquiesce in the truth of all that has been sworn to in that respect. There is no injustice therefore in the defendant having to pay a debt, which is not denied to have been originally an honest debt, and which is acknowledged to be still unpaid.

Besides, however stale the demand, the statute of Limitations does not in fact, under the circumstances, afford protection against it; for the holder of the notes, having always remained out of the jurisdiction of this province till lately the case comes clearly within the exception in the statute; and without the help of any recent promise, such as the defendant is proved to have made, there would have been no difficulty in enforcing the demand, so far as the statute was concerned; for to any plea of the statute, the foreign residence of the holder of the notes being properly replied, would have saved the case from its operation.

All that can be said, where claims of this kind are advanced after twenty, or thirty, or fifty years, is, that upon

proper pleas of payment, it is open to the jury to conclude from the mere lapse of time and omission to enforce them, that the debt must have been paid ; but that conclusion is always open to be rebutted by circumstances leading to a contrary conclusion ; and in this case the jury could not, upon their oaths, find this debt paid in the face of such explicit recognitions and promises to pay as were proved to have been made by the defendant at a late period.

Then with regard to interest, the jury shewed a disposition to disallow interest for a longer time than six years, if the court were of opinion that they had a discretion to do so. In *Dubelloix v. Lord Waterpark*, 1 D. & R. 17, where a note of hand was sued upon after a lapse of thirty years, the jury threw off the interest ; but there there was no contract to pay interest. All these notes are, on the face of them, made payable *with interest*. Still, if the jury had, from the extreme laches in enforcing the claim, disallowed interest, and had given their verdict for the principal only, this court might not have felt it necessary to set aside the verdict on that account ; but when this has not been done, and it has been reserved for us to say, as a legal question, whether they could properly disallow interest or not, we can only say that the contract being express to pay interest, the plaintiff has in law the same right to the interest as to the principal, and we cannot by any act or judgment of ours direct or sanction its disallowance, though we might have abstained from interposing if the jury had taken on themselves to disallow it.

Then as to the only point in the case that can create any doubt. The plaintiff sues on these notes, as administrator of Marvin, the payee, or rather as administrator, with the will annexed, of the goods left unadministrated by Lockwood, the executor. He declares upon a promise made to himself, as administrator ; which promise is denied. The issue raised upon it calls for proof of an express promise. It is not pretended that there was in fact any promise made at any time *to this plaintiff, Beard*, in person ; nor that any promise had been made since he became administrator ; but the proof is of promises made to a third party, who

came forward with these notes to the defendant, and demanded payment of them, not under any direction from this plaintiff, and before this plaintiff in fact had any legal connection with the estate.

The proof then, it is clear, is not that such promises were actually made as are laid; but are, or are not promises made as these were, to be looked upon in law as made to the administrator in consequence of the legal fiction, which carries back the authority of the administrator by relation, so as to cover all the period from the death of the testator or in this case from the death of the executor Lockwood?

This point has given us much trouble to determine. I believe my brothers, who now give judgment with me in the case, were, as well as myself, for a long time of opinion that the weight of argument was against the plaintiff. Our subsequent consideration of the case has brought us to the contrary conclusion; but I cannot say that I am entirely free from doubt, though the best opinion I can form upon such authority as can be found, is that the plaintiff is entitled to recover.

The principle of relation back of administration is one on which there is no doubt in a general sense; the only question is, whether it can be carried so far as to meet this case. In Com. Digest, Administration, B. 10, it is said: "So though administration be not granted for a long time, it vests the property in the administrator, by relation, from the time of the death of the intestate." There is no doubt that it does so; but in a note to this passage, the last editor of Com. Digest adds the qualification: "But a contract obligatory or not, as the party is or is not administrator, is not made valid by a subsequent grant of administration *ut videtur*." A promise to pay a sum of money is a contract; and this passage, taken literally, would imply the editor's opinion to be that, in a case like that before us, there could be no valid contract with, or promise to this plaintiff, Beard, as administrator of Marvin, to pay him the money, when, at the time of the alleged promise, he was not administrator of Marvin and could have no legal connection with the subject of the contract. We could not rely upon this

suggestion of Mr. Hammond's as authority, especially when he makes it so doubtfully and refers to no decisions.

In support of his opinion, it is to be considered that Mr. Beard, at the time of this alleged promise being made, could not have released the debt; and could, neither in person nor through an agent, have entered into any compromise with the defendant, which would even have bound himself afterwards, if when he became administrator he chose to repudiate it. And again, until he administered, the Statute of Limitations (if he had been resident here,) would not have run against him.

If the defendant's promise had been made to him personally, in 1846, and he had brought no action for six years afterwards, and had then for the first time taken out administration and sued for the debt, he would have been held to be in time, because the Statute of Limitations would not have begun to run against him till he was actually administrator. There is an apparent incongruity in admitting this, and at the same time holding that before administration he can yet be treated as having been administrator, for the purpose of enabling him to avail himself of a promise made by the debtor to the estate; that the relation back shall, in other words, be allowed to confer a right or privilege upon him in respect to the debt, and yet not subject him to a disadvantage in regard to the remedy.

I cannot, however rely on this as decisive of the question; for I have no doubt that in *Foster v. Bates*, 12 M. & W. 244, and any case of that kind, where the administrator has been allowed, on the principle of relation back, to sustain an action as upon an implied contract made with him (though he was not at the time administrator), the Statute of Limitations would nevertheless not be held to have commenced running against him till he actually became administrator; and this, upon the general principle of law, that a legal fiction such as this of the relation back, shall not be allowed to work injustice, though it may aid in sustaining a just demand.

The case of *Suwererop v. Day*, 8 Ad. & El. 629, was relied upon by the defendant's counsel as an authority in

his favor; but it is inconclusive when carefully examined, or rather leads to an inference against this defendant, for the order which the court made, did in fact embrace interest as upon forbearance by the administrator during a period when he was not in fact administrator, though we might suppose from the language used in the case, that the court considered it could not be recovered under the second count. There is an inaccuracy in the report in this respect, so that it would be unsatisfactory to lay much stress upon it.

On the other hand, there is the general principle of relation back, which has from the earliest time been recognized as from necessity, in order to entitle the administrator to a remedy for property converted or injured between the death of the intestate and the granting of administration; for otherwise the whole property might be wasted with impunity during an interval which must occur.

The same argument of pressing necessity would seem to apply in regard to the collection of debts due to the estate, which are part of the property in fact: for otherwise, where the statute had begun to run in the lifetime of the intestate, and the six years were near expiring at his death, no efforts which those in charge of the effects could use, could prevent the debts from being barred. Some interval must always elapse before letters can be obtained—just in that interval the six years might expire, and if no promise, however explicit, made in the interval, even to an agent or book-keeper, or nearest relative of the intestate, could afterwards be relied on by the administrator, the consequences might in some cases be very injurious.

In *Foster v. Bates*, 12 M. & W. 224, the court were pressed to apply the relation back so as to sustain an action by the administrator for goods sold and delivered by an agent, as if sold by him in his capacity of administrator, though at a time when he was not yet administrator. They felt that they were treading upon new ground, but they considered it as a legitimate consequence of the relation back, that the action might be so laid; for as the goods must be considered to have been the administrator's from the time of the death, if he were willing to adopt the act of the agent in selling

them (as it might be necessary to do in the case of perishable goods,) then it would seem to follow irresistibly that he might be allowed to sue for his goods sold. This decision has been confirmed in a case of *Welchman v. Welchman*, determined very recently in England, and together with *Hooper v. Stallwood*, 3 Dow. N. S. 24, and *Clark v. Hooper et al*, 10 Bing. 480, seems to me to establish the right of the plaintiff in this case to succeed upon the evidence which he gave.

There are many cases which shew that a promise made to a third party, and even to a mere stranger, may enure to the benefit of the person representing the cause of action. This has often been determined with reference to promises relied upon for taking a case out of the Statute of Limitations, and to acknowledgments upon which such promises have been implied. It is true that this plaintiff might, if he pleased, have refused to be bound by any thing done by *Legrand Marvin* on behalf of the estate, or even by a payment made to him; but that would not shew that he may not if he pleased, adopt and ratify it, for the books are full of cases where that principle has been acted upon. Neither would it be just to look upon the witness *Marvin* as being a mere stranger officiously intermeddling in the matter, for he had the securities in his possession, and the defendant when he was conversing with him, had every reason to suppose that he was conversing not with a mere stranger in an idle and casual manner, but with a person who, as a matter of business, came to demand payment on behalf of the estate.

In *Williams on Executors*, 395, and in *Wentworth on Executors*, the principle of relation is laid down with no clear limitation or exception, further than that the fiction shall be never suffered so to operate, as to divest a right legally vested in another, between the death of the intestate and the grant of administration, as in *Rex. v. Mann*, 1 Str. 97. No such reason for an exception occurs in this case, and I think we must hold:

1st. Upon abundant authority, that if *Beard* had been administrator in 1846, when the defendant promised to pay

the debt, he might have sued upon that promise made to Legrand Marvin, although the latter was not at the time representing him by his authority.—4 Esp. 46; 3 B. & Ad. 141; 1 Moo. & Rob. 330; 3 D. & Ry. 322; 10 Big. 480.

2nd. That although he did not obtain letters of administration until afterwards, yet that he may, upon the principle of relation back of his authority, sue upon that promise as (being in contemplation of law, for the promotion of the ends of justice,) administrator from the death of Lockwood.—7 T. R. 182.

If these notes, instead of being given fifty years ago, had been given ten years ago, and the payee living in this province had died just within a few months of the debt being barred by the statute of limitations, and if any relative or the person in charge of his papers and affairs, in order to prevent the debt being lost before administration could be taken out, had gone to the defendant with the notes in his hand and demanded payment, and had received an explicit promise to pay the debt, such as was proved on the trial, I think we should have held without much doubt that the remedy would be saved by such promise, and that the administrator afterwards obtaining letters of administration, could sue upon the promise as made to himself, and recover; and yet the same principle which could have admitted of the plaintiff's recovery in such a case, must equally apply under the actual circumstances of this case. The mere difference in the great lapse of time can make no change in the legal doctrine.

Though no exact authority has been cited, nor I believe can be produced, I think that a fair application of the cases of Foster v. Bates and Clark v. Hooper, entitles the plaintiff to recover upon the evidence given.

MACAULAY, J.—In this case the plaintiff sues as administrator, with the will annexed *de bonis non*, left unadministered by Lockwood, executor of Ozias Marvin, deceased.

The counts in the declaration now in question, state cause of action in simple contract, which has accrued to the testator in his lifetime; but the promises to pay are

alleged to have been made to the plaintiff as administrator since the death of the testator.

To these counts the defendant has pleaded non-assumpsit, denying the promises laid. At the trial express promises to pay, since the death of the testator were proved; but such promises were made between the death of Lockwood, the executor who had administered to the estate of Ozias Marvin in the United States, and the grant of letters of administration to the plaintiff.

It was not objected that under the plea merely denying the promises alleged, the defendant could not, after proof of express promises shew *when* letters of administration were granted; but it was contended, that although such promises preceded the grant of such letters, they enured to the benefit of the plaintiff by relation.

The promises proved were made to a stranger, or rather to a person who was acting on behalf of those interested under the will of the testator, and who having the promissory notes declared upon in his possession, stood in the situation of an executor *de son tort*.

It is said in some cases that an administrator derives his title wholly from the Ecclesiastical Court—8 B. & C. 285; 2 M. & R. 350; 5 B. & Al. 746—while elsewhere it is said he derives his authority from the law—10 Mod. 21.

On looking back it will be found, that the goods of persons dying intestate, were supposed formerly to belong to the king as *parens patriæ*, and that he afterwards invested the prelates with this branch of prerogative, and the goods of an intestate were given to the ordinary.—2 Bl. Com. 494; 9 Rep. 37-8; Com. Dig. Adm. A.

In Co. Litt 344 (see *ib.* 96) the ordinary is said to be he that hath ordinary jurisdiction in cases ecclesiastical immediate to the king and his court of common law, for the better execution of justice, as the bishop or any other that hath exempt and immediate jurisdiction in causes ecclesiastical.

The effect was that the ordinary had the disposal of the goods of persons dying intestate; but he could have no action to sue for, nor could he release debts due to the intestate.—Dyer, 225-6; 9 Co. 37-8.

And although he might at common law appoint deputies or committees, they could not sue for or release debts, possessing only the delegated authority derived from the ordinary.

Thus matters continued until the statute 13 Ed. I. ch. 1, sec. 19, made the ordinary answerable for the debts of the intestate, so far forth as the goods would extend, in such sort as the executors of the dead would have been bound, had he made a testament, and by the equity of this statute an action would lie against his deputies or committees, if they had intermeddled with the goods by the name of executors, which would seem to be the original of *executors de son tort*.—Plow. 277-8; Dyer, 355-6; 2 Inst. 398; 1 Roll. Ab. 906, 1. 15; Fitz. N. B. 120, d.

Owing to a previous want of privity, the statute 25 Ed. III. stat. 5, ch. 5, gave to the executors of executors actions of debt account, and of goods carried away of the first testator in the same manner as the first testator should have had if he were in life, as well of actions at the time past as of the time to come, in all cases where judgment is not yet given, &c.

Statute 31 Ed. III. ch. 11.—In case any man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased (extended by stat. 21 Henry VIII. ch. 5) to administer his goods, which deputies shall have an action to demand and recover, *as executors*, the debts due to the said person intestate, in the king's courts, &c.

This is the origin of administrators as at present appointed, and of their right to sue for and collect the debts of the intestate, and shews that although they derive their title generally speaking from the ecclesiastical court, they derive their authority to sue for the recovery of debts from the law.

Lastly: by statute 17 Car. II. ch. 8, sec. 2, when any judgment after verdict shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *sci. fa.* and take execution upon such judgment.

Now the above statutes relate principally to *administrators* of persons dying intestate, but the present is the case

of an administrator *de bonis non* with the will annexed; and therefore if there be any difference more closely resembling an executor than an ordinary administrator: and since the statute 31 Ed. III. ch. 11, enacts that administrators may have action to demand and recover *as executors*, the rights of the executor were he alive, and suing, as in the present case, should be considered.

Moore, 44, Ca. 139.—That an administrator is *per statute* to all purposes like an executor.

If Lockwood the executor were alive, and had he obtained letters testamentary at the time the plaintiff obtained the letters of administration, it would then have been the case of an executor supporting the allegation of a promise to pay him as executor, by proof of a promise made to a third person before probate.

Although the Statute of Limitations is not pleaded to the counts in question, still the same question might have arisen had it been pleaded and issue taken thereon; for the only difference would be, that in such event the plaintiff must have proven an express promise, or given evidence of acknowledgment of liability, whence an express promise might be inferred by the jury within six years before action brought, while upon the present issue, it is open to him to prove such promise at any time. In either case the matter to be proved is an express promise, or promise in fact, as distinguished from an implied promise or promise implied by law.—2 H. B. 561, and notes.

And that the present as laid is an *express* and not an implied promise, is shewn by—2 M. & W. 720; 5 M. & W. 117; 5 U. C. R. 60; 2 Str. 919; 2 Barnes 73, S. C.

The notes having become due in the lifetime of the testator, the Statute of Limitations had commenced running in his lifetime, however liable to be avoided by reason of his absence abroad under the saving of the act; consequently the statute continued to run after his death, and at the end of six years the notes were outlawed, and the Statute of Limitations might be pleaded, although subject to be exempted from its operation by bringing the case within the proviso or saving clause by way of replication.—2 Ver-

non, 644; Law Times, 19 May, 1849; 10 Vez. 93; 4 Taunt. 826; Willes, 27; 1 Wil. 134; 2 Saund. 63 (f); 4 Bing. 686; 1 M. & P. 663; 4 M. & W. 42; 6 M. & W. 351; 5 M. & W. 117.

But assuming that this could not be done, and that the executor Lockwood would, if plaintiff, have been driven to rely upon a promise to himself as executor, the questions would be:

1st. Whether promises, or acknowledgments equivalent to promises, made by the defendant to a third person, in the absence of the plaintiff, could, even had he previously obtained letters of administration, be given in evidence to support the averment. That he could many cases shew. See 4 Esp. 46; 3 Camp. 32; 4 East. 599; 1 Smith, 125; 6 Taunt. 210; 1 B. & A. 93; 1 B. & C. 250; 3 Star. N. P. C. 186; 3 B. & A. 141; 2 B. & C. 149; 3 D. & R. 322; 2 B. & C. 824; 3 East. 409; 2 Saund. 63 (g); 7 T. R. 182; 2 Burr. 1099; 16 East. 420; 5 M. & S. 75; 10 Bing. 480; 4 M. & S. 353; 4 Tyr. 94; 2 C. & M. 323; 6 B. & C. 603; 3 M. & W. 402; 3 Q. B. 574, 561; 14 M. & W. 741; 2 M. & W. 721; 6 Bing. 349; 2 Y. & C. 612, 677; 9 D. & R. 40-3; Byles on Bills, 268; see Smith on Contracts, 315 and note; 12 Sim. 17; 1 Moo. & Rob. 359; Taylor's Ev. 722; 3 M. & W. 402; 12 M. & W. 159-60; 1 A. & E. 102; 3 M. & W. 863; 17 L. J. Ex. 357; 1 Ex. R. 617-18; 16 L. J. Ex. 232; 1 B. & C. 150; 2 D. & R. 271; 7 Bing. 163; 5 M. & W. 495; 2 B. & C. 23.

As to account stated, see—4 C. & P. 126; 4 M. & W. 32; Free. 538. If an executor states an account with a debtor, he may (if he pleases) afterwards sue in his own name for this debt, for the stating of the account raises a new debt, or he may sue as executor—1 Taunt. 322; 6 East. 405; 11 M. & W. 542; 15 L. J. 52, Q. B.; 13 L. J. 133, C. P.; 1 A. & E. 488; 2 M. & W. 2; 8 Jur. 963.

That an acknowledgment affords evidence of an implied promise to pay: see. 1 Sal. 29; 1 Lord R. 421-2; 2 Saund. 63 (g); 6 Taunt. 210; 1 B. & A. 93; 1 B. & C. 250; 3 East. 409; 16 East. 420; 6 Bing. 349; 6 B. & C. 606; 9 D. & R. 40, 43; S. C. 549; 3 N. & M. 512; R. & M. 416; 2 B. & C. 28; 9 C. & P. 209; 14 M. & W. 1, 741; 3 Q. B. 574;

Smith on Contracts, 314, (C.) 12 M. & W. 159; 3 M. & W. 402; Rex. v. Smith, 7 C. & P. 149.

2nd. If so, then whether the want of letters testamentary at the time could make any difference. It would seem hard to hold that the Statute of Limitations could avail the defendants under such circumstances. The time may (in any given case) have nearly expired at the death of the testator: and the debtor may have unequivocally admitted his liability, and promised to pay soon afterwards, though before proof of the will, or the grant of probate or letters of administration to the executor, and I apprehend the defendant would be liable.—1 C. B. 139.

Of course the situation of the executor, as respects the doctrine of relation, is different from that of the administrator of an intestate; still the latter is entitled to have an action to demand and recover *as executor*, the debts due to the intestate: and in such case an executor might avail himself of the promise, the argument is strong, that by analogy the administrator could also—1 B. & B. 282; 5 B. & A. 204; 5 M. & G. 760; 12 M. & W. 226; 3 Bing. N. S. 814; 8 East. 410; 5 M. & W. 117.

That *relation* does not operate to all purposes, is clear. For example, a *release* given by a person who afterwards becomes rightful administrator, will not estop him.—Middleton's case, 5 Co. 28; Moore, 119, 126; Palmer, 411; 1 Sal. 295; 11 Vin. Ab. Exor. B. 52; Bro. Ab. relation, 15; see 3 Bing. N. S. 841.

So in cases where no right of action had accrued to the intestate in his lifetime, but only to his administrators afterwards, the letters do not relate back so as to bring the Statute of Limitations into operation, and it only runs from the date thereof, by reason of the working of the act 21 Jac. I. c. 16, which limits the suit to six years next after the cause of action or suit, and under which it has been held there is no cause of action until there be a person capable of suing.—Cro. Ja. 61; Sal. 421; 4 Bing. 686; 1 M. 663; 5 B. & A. 204; 8 B. & C. 285; 2 M. & R. 350; 8 East. 410; Sel. N. P., 6th edition, 717.

But in the case before us, there was a cause of action subsisting in the testator at the time of his death, subject only to the effect of the Statute of Limitations, if available as a bar thereto, not as extinguishing the right of action, but merely as precluding a recovery thereon.—2 B. & Adol. 413; Byles on Bills, 256. And it is clear, that upon the grant of administration to the plaintiff, the letters had relation back to the death of the testator, so as to vest such cause of action in the plaintiff; that is, a cause of action founded on the notes, and promises to the testator in his lifetime.—2 M. & W. 720, ante.

5 B. & A. 204.—The acceptance after death of the testator, was a *promise* to the administrator with the will annexed, when such administration was granted. The cause of action as laid, are the notes so due to the testator, with an express promise to pay the plaintiff as administrator after his death.—2 M. & W. 720. Now, at the time of the defendant's promises, the plaintiff was by relation owner of these notes as choses in action; so that, had the defendant obtained and destroyed them, the plaintiff might have maintained trespass or trover against him.—5 M. & G. 760. And administrators have always been held within the equity of the statute 4 Edw. III, chap. 7, which enabled executors to bring actions for trespass to the estate of the testator during his lifetime. In the above case, Tindal, C. J., says, "It would be strange indeed, if an administrator might sue for a trespass committed in the lifetime of the intestate, and for one committed after the grant of the letters of administration, but not for one committed in the intermediate time." This of course rests upon the argument of necessity to prevent a waste of the assets by wrong-doers.—1 M. & G. 159; 3 A. & E. 493; 7 Q. B. 766; 2 C. B. 516.

If the executor himself, obtaining probate after such acknowledgments and promises, could avail himself thereof, why cannot the administrator *de bonis non* with the will annexed? There was, to be sure, no executor living at that time; but the plaintiff succeeds the executor, and in contemplation of law owned these notes and had a right of action thereon against the defendant at the time he made the promises.—6 Mod. 220.

Then, looking at the witness Marvin in the light of an executor *de son tort*, or as a voluntary agent in the premises, the maxim of relation by subsequent assent or adoption is applicable. Had the defendant paid the witness, it certainly would not have discharged him; but had he done so, and the plaintiff afterwards elected to confirm the act and sue the witness for money had and received to his use, it would have been otherwise; and if there existed a right of election, then in this case the plaintiff evinces his desire to elect the agency of the witness, so far as it went.—6 Mod. 293; ib. 92, 3; 13 Jurist, 388; 8 M. & W. 331; 3 M. & W. 495; 1 B. & B. 282; 12 M. & W. 226; 5 M. & G. 760, and 6 Scott N. R. 715; 4 Bing. 727; 10 Jurist, 771. The cases most in point are—7 T. R. 182; 3 East. 409; 2 B. & C. 149; 10 Bing. 480; 12 M. & W. 226; 5 M. & G. 760; 13 Jurist, 388; 6 Mod. 293; ib. 923; 13 Jurist (1849), 380.

These cases seem to shew, that had the plaintiff been administrator at the time of the interviews between the witness and the defendant, his acknowledgments and promises would not have amounted to proof of an account stated being made to a stranger, but that they would have been sufficient to take the case out of the Statute of Limitations; in other words, to support the allegation of an express promise to pay the plaintiff as administrator.

But the case still presents this difficulty, that the evidence would not support a count upon an account stated with the plaintiff as administrator, and that if it amounted to proof of a promise to pay him as such administrator to take the case out of the Statute of Limitations had it been pleaded, it still remains a question whether the statute continued running from the time of such promise, or was suspended thence forth until the time of the grant of administration to the plaintiff. If it was a new original transaction, as the sale of goods, the receipt of money, or wrongful conversion, &c., the case of *Murray vs. E. I. Company*, 5 B. & A. 204, shews that the statute would not begin to run till an administrator was appointed, there being no cause of action vested in any one upon the implied promise in law or the wrongful act

till that period; but it does not follow that a like rule applies to an express promise founded on a previous transaction, there being no new consideration, only a promise to a new party.

In the former case, no other or prior promise ever existed; and the consideration being executed, it might be said the law was ready to and did raise an implied promise to pay the party entitled to payment, the moment letters of administration were granted; whereas in the latter case, the law raised no implied promise to pay the plaintiff; and the promise laid, and to be proved, is an *express* one, not arising by implication from the nature of the transaction, but only shewn by express proof thereof; in which event, an express promise to a stranger must be held to enure to the benefit of a party not then in esse to receive it, by relation back to the letters of administration afterwards granted to that period.

The difference on this head between implied and express promises is manifest, and constitutes the real difficulty of this case. It cannot be said of an express, as it may of an implied promise, that it is suspended till a person is appointed entitled to the benefit thereof, and in whom a cause of action *then* vests, and not by *relation*. The express promise can only be made available by relation; it is not like an implied one, springing from an executed consideration, always ready to create and to sustain it. The express promise is made once for all; it is not, as it were, in abeyance, like the implied one. The one is the act of the law; the other, of the party. There are these differences; and if the express promise is sustained on the doctrine of relation, then the difficulty is, to refuse to the Statute of Limitations its full operation, as from that time, although no administrator was appointed for many more than six years afterwards.

Rested on relation, I apprehend the statute would run from the period of time to which the letters of administration did relate, *i. e.*, from the time of the promise; and this argument was only got rid of in the cases of implied promise (5 B. & A. 204) on the ground that no cause of action vested; in other words, that no promise arose till the

appointment of an administrator on the peculiar wording of the Statute of Limitations.

On the whole, however, relinquishing my former impressions, I am disposed to think the soundest conclusion to be drawn from all the authorities is, that in furtherance of the justice of the case, the doctrine of relation may be fairly and properly applied in the present instance, so as to give effect to the acknowledgments and promises in evidence, to sustain the alleged promise to the plaintiff as administrator; and that the plaintiff should therefore recover: and if so entitled as to the principal debt, I do not perceive any sufficient ground on which interest, which is also payable by the terms of the notes or contracts, can be withheld or restricted in point of time or amount. If it could be done legally, I should be quite disposed to curtail it, and limit it to six years last past. As to interest, see 1 Atk. 151; 5 T. R. 553; 1 D. & R. 17; 2 Moore, 745; 2 B. & A. 305; 10 A. & E. 222; 5 B. & A. 204, 217; 1 Star. 452; R. & M. 381; 2 B. & Ad. 447; 4 Bing. 313; 12 Moore, 557; 5 U. C. R. 60; *ib.* 148; *ib.* 114.

DRAPER, J., concurred.

Per Cur.—Rule discharged.

BANK OF BRITISH NORTH AMERICA V. JAMES BROWNE.

The Bank of British North America is entitled to sue in Upper Canada in its corporate name.

The plaintiffs sued on a promissory note, made 20th June, 1848, by D. Bethune, to David J. Smith or order, three months, for 200*l.*, indorsed by Smith to the plaintiff, and by the defendant to the plaintiffs.

They sued in the corporate name of "The Bank of British North America."

The defendant pleaded, that the name so used was at the time of commencing this suit, and still is, the name of a company or partnership, formed for the purpose of establishing and carrying on banks of issue and deposit in this province and in other British colonies in North America; which said company, by the statute of U. C. 7 Wm. IV. c. 34, was at the commencement of this suit, and still is,

authorized to prosecute all proceedings at law in Upper Canada wherein the said company are concerned or interested, in the name of some one of the local directors, or of the manager of the said company in Upper Canada at the time of bringing such action, as the nominal plaintiff for and on behalf of the company. And the declaration averred that the cause of action in this suit accrued to the company by the name aforesaid, after the passing of the statute referred to, and within Upper Canada, to wit., at Toronto; without this, "that the Bank of British North America aforesaid is, or at the commencement of this suit was, a corporation, or entitled to commence or prosecute any action within Upper Canada, by or in the name or style of the Bank of British North America, for or on account of the cause of action in the declaration mentioned," concluding to the country. Issue.

Verdict for the plaintiffs—209*l.* 5*s.* 6*d.*

It was proved on the trial, that on the 23rd of April, 1840, a charter of incorporation, under the great seal of the United Kingdom, was granted to the association, which is now suing as plaintiffs, incorporating it under the name of "The Bank of British North America," giving to the company so incorporated, power to sue and be sued by that name in all the courts of law and equity; and declaring that they are so established for the purpose of carrying on the business of banking within any of the British colonies or settlements in North America.

It was contended for the defendant at the trial, that the provincial statute of Upper Canada, 4 Wm. IV., disabled the now chartered body from suing as a corporation, and that they could still only sue as that act provided in respect to the same company before its incorporation, that is, in the name of some one of the local directors, or of their managing agent.

The case was tried before the Chief Justice, who ruled that the defendant could not be held to have proved his plea; for that unquestionably the Bank of British North America was a corporation; and if so, then the plea which denied that the bank was a corporation, or entitled to sue in Upper

Canada by the name of the Bank of British North America, was disproved. He considered, moreover, that both the statements in the plea were disproved; for that the bank was also now entitled to sue in Upper Canada in its corporate name.

Phillpotts obtained a rule for a new trial on the ground of misdirection. *A. Wilson* shewed cause, and cited 2 Br. Pa. C. 336; 6 T. R. 268.

ROBINSON, C. J., delivered the judgment of the court.

The provincial statute referred to (7 Wm. IV. c. 36) recited, that a company had been formed, called the Bank of British North America, for the purpose of carrying on the business of banking in the British American colonies, which enterprise it was believed would be very beneficial to the province; and that difficulties might arise in recovering debts due to the company, and in enforcing claims for or on account of the company, and generally in suing or being sued, and in prosecuting persons who might steal or embezzle their property—since by law all the proprietors or shareholders for the time being must in such cases sue or be sued, and prosecute, by their several and distinct names and descriptions—for obviating and removing these difficulties, the statute enacts, that all suits for or against *the said* company shall and may be lawfully commenced and prosecuted by or against any one of the local directors, or the manager of the said company, in his proper name as acting for and on behalf of the said company.

The necessity for this provision we cannot fail to see, from the fact of the company in 1837 not being incorporated either by royal charter or by act of parliament; and the inconvenience of having to use in every legal proceeding the names of some hundreds of shareholders, constantly changing, would be intolerable.

The charter granted in 1840, however, coming after this provision, removed all necessity for its further application and created as clear a case for the application of the maxim, "*cessante ratione, cessat et ipsa lex*," as can well be stated. It is not necessary for us now to consider how far this royal

charter has superseded or interfered with the provisions of the provincial statute in other particulars; but I take it to be quite clear that the statute passed to remedy a defect occasioned by the want of a charter, cannot have the effect of disabling the incorporated company of making use in this province of the privilege expressly given to them in their charter, of suing in their corporate name; which privilege, indeed, they would have had at any rate, upon their becoming incorporated under a corporate name and with a corporate seal, even if the charter had been silent on the matter.

But this question is before us upon an issue raised by a special plea, in which it is denied by a formal traverse, "that the Bank of British North America is, or at the commencement of this suit was, a corporation, *or* entitled to commence or prosecute any action within Upper Canada by or in the name or style of the Bank of British North America, for or on account of the cause of action in the declaration mentioned."

Now, that cause of action must plainly have accrued to the company since its incorporation; and from the manner in which the plea is formed, if either the plaintiffs are a corporation, or are entitled to sue in the name which they are here using, then the plea must fail which denies that they have either the one pretence or the other for suing as they have sued.

It is impossible to deny that the plaintiffs do compose a corporation, and that alone settles the question of who is entitled to succeed upon the issue; but I am equally of opinion, that since their charter, they are entitled, under their charter, to sue in Upper Canada in their corporate name.

I do not consider that the case which was cited, of *Rex vs. Miller*, 2 T. R. 268, is applicable to this question; for this is not the case of seeking to alter by a royal charter the terms of a legislative charter.

In 1837, the company was not incorporated; and to remedy that defect, and of course only while it existed, the convenience was accorded to the company of suing through one of their officers and in his name. It would be repugnant

to hold, that that which was provided as a substitute for a corporate capacity, should be necessarily held to continue, notwithstanding the subsequent legal grant of a corporate capacity. It would seem as reasonable to hold, that when the legislature, by a private act, had authorized some one to execute conveyances for an infant or a married woman, such infant or married woman could not afterwards make conveyances for the same purposes in their own name and in the ordinary manner, though their disability had ceased.

Per Cur.—Rule discharged.

GRANTHAM V. POWELL.

Statute of Limitations.

Held per Cur.—That the following expressions of the defendant: “The notes are genuine—that is, I made them—but I am under the impression that they were paid through Messrs. Gamble and Boulton”—and, “I don’t think I am called upon to have any further conversation with you about them”—were not sufficient to take the case out of the Statute of Limitations.

The plaintiff sued in assumpsit on two promissory notes and on the common counts.

One of the notes was made by the defendant on the 22nd of December, 1841, payable to the plaintiff or order in ninety days for 12*l.* 10*s.*; the other for the same sum, made on the same day, and payable in six months.

The Statute of Limitations was pleaded.

The only other demand was an item of 5*l.*, claimed by the plaintiff as due to him on an exchange of horses, made with the defendant in 1840.

The defendant pleaded the statute, in bar of this demand also.

The plaintiff replied to both pleas that his action did accrue within six years.

The evidence on which the plaintiff relied for taking the case out of the Statute of Limitations was this: as regarded the two notes given by the defendant to the plaintiff, it was proved by one Bishop that in 1841, within the six years, he went as a friend of the plaintiff’s, and by his request, to the defendant and demanded payment of the notes, shewing them to him. The defendant said, “the notes are genuine, that is, I made them, but I am under the impression that

they were paid through Messrs. Gamble and Boulton." Bishop then renewed his request for payment, and the defendant said, "I don't think I am called upon to have any further conversation with you about them."

In respect of the item of 5*l.*, a servant in the employment of the plaintiff said that a few years ago (within the six years,) he heard the plaintiff ask the defendant for payment, when the defendant admitted that he had not paid the debt, and said he was expecting some money to be left him by a relation, and when that happened, he would pay.

The Chief Justice ruled at the trial, that there was not in either case that unqualified admission of a debt on which a promise to pay could be implied by law, and the defendant, upon this opinion being expressed, did not address the jury, who found, however, a verdict for the plaintiff.

Vankoughnet obtained a rule to set aside the verdict as being contrary to law and evidence, and perverse. *Hawke* shewed cause.—The authorities cited were, 6 B. & C. 703; 14 M. & W. 741.

ROBINSON, C. J., delivered the judgment of the court.

My brothers agree with me that the verdict was against law and evidence.

Since the case of *Tanner v. Smart*, 6 B. & C. 703, to say nothing of previous decisions to the same effect, it has been constantly held, that when a debt is barred by the statute, and the defendant evinces a determination not to pay it, though he may not deny the existence of the debt, there the court ought not to allow an implied promise to pay to be raised, for it would be contrary to the defendant's conduct and determination, by which he evinces an inclination to avail himself of the statute. This was the case here as regards the notes.

Then as to the 5*l.*, the defendant only promised to pay when he received money which he expected, and it was not attempted to be proved that the contingency had arrived upon the event of which the promise was founded. See 14 M. & W. 741.

Per Cur.—Rule absolute for new trial without costs.

PARDOW V. BEATTY.

New Trial.

The defendant, in moving the Court in banc, for a new trial, on the ground that his cause was taken on the first day of the assizes, in the absence of his attorney or counsel, must unequivocally state that he has a just and legal defence to the action.

Assumpsit against the defendant as endorser of a promissory note.

Pleas denying endorsement and notice.

Verdict for plaintiff 70*l.* 14*s.* 1*d.*

The defendant moves for a new trial—with costs to be paid by the plaintiff—the cause having been taken out of its order, on the first day of the assizes, in the absence of the defendant's attorney or counsel.

ROBINSON, C. J., delivered the judgment of the court.

The application is entirely founded on affidavits, and the ground is that the defendant's attorney who had been in court part of the day, and before the case was tried, went away, and that afterwards this cause was called on when neither counsel nor attorney for the defendant was present, it not being, as the defendant's attorney swears, the one first in order.

On the other hand it is shewn, that cases lower down were tried on the same day, and there seemed to have been no case ready for trial which stood before this. It is not a case for relief, unless it be unequivocally stated that the defendant has a just and legal defence.

The proof given of endorsement and notice was clear. The fact of endorsement indeed is not denied in the affidavits, though it is denied by plea, on the record.

Then, as to the notice, the defendant swears that "he believes he has a good defence to the action, on the ground that notice of non-payment was not given in time; and he adds that the notice of non-payment was served (he does not say when,) on Martha Crookshanks, a person who can not write and cannot read writing." He does not swear, however, that he did not receive the notice in time, nor does he produce any affidavit from Martha Crookshanks.

It was sworn by a notary-public, who was also agent for the bank at which the note was payable, that he left a

written notice of non-payment in proper terms at the defendant's house, on the same day it fell due, with his servant woman there, who stated that the defendant was not then in the house. The fact sworn to by the defendant, that the woman who received the note, is unable to read or write is quite immaterial, unless that circumstance led to her being ignorant of the consequence of not delivering the notice to the defendant promptly, which there is no reason to infer, since at any rate, she could not have opened and read the letter; and the defendant is silent on the only point on which his defence must turn, namely, whether he did or did not receive the note which was left at his house, with his servant, for him; and at what time he received it.

Per Cur.—Rule discharged.

RUSSELL ET UX. V. GRAHAM.

To an action of covenant by landlord against his tenant for not surrendering land at the expiration of the lease, it is a bad plea to plead a surrender by a third party (whose legal estate is not shewn to have been derived from the plaintiff) to the Queen, and that therefore the land, at the expiration of the lease, did not belong to the plaintiff.

Declaration—covenant—for breach of the terms of a lease, in not surrendering possession of premises demised to the plaintiff, at the expiration of the term.

Plea (in effect) that a third party, certain Indian chiefs, whose legal estate in the premises was not shewn at all, made a surrender of the land to her Majesty during the term to hold to her Majesty in fee, wherefore the defendant says the land did not belong to the plaintiff at the expiration of the term.

Demurrer to plea: because it did not shew that the plaintiff had recognized such surrender, and because the tenant, could not dispute his landlord's title.

Notman, of Dundas, for the demurrer. *Miller*, of Woodstock, contra.

The cases cited were—4 U. C. R. 398; *Doe Jackson v. Wilkes* in our own court.

ROBINSON, C. J., delivered the judgment of the court.

The defendant's covenant is express, that at the expiration of his term, which ended on the 13th March, 1849, he

would surrender up possession of the premises to the plaintiff, from whom he took his lease. This action is brought because he did not do so; and his defence is, that though Catherine Russell, his lessor, and one of the plaintiffs, was the owner of the land when she demised, which he could not deny, yet that somebody else, whose legal estate in the premises is not shewn to have been since derived from her, and indeed is not shewn at all, made a surrender of the land to her Majesty during the term, to hold to her Majesty in fee, wherefore the defendant says the land did not belong to the plaintiff, Catherine Russell, at the expiration of the term.

But the title of his lessor could not be affected by any surrender made by a party whose right is not shewn to have been derived from her, when he admits that, at the time of her demise, the land was the property of the said Catherine Russell.

Per Cur.—Judgment for plaintiff on demurrer.

BATES V. WALSH.

In giving notice of action to a magistrate, the notice must declare the *place of residence* of the attorney. The subscription of the attorney therefore at the bottom of the notice, in this form—"A. B., attorney of the said C. D. Simcoe, Talbot District," was held insufficient.

Trespass and false imprisonment.

Plea by statute, "not guilty."

The defendant is a justice of the peace of the District of Talbot, and had issued a warrant against plaintiff, for cutting timber on the land of one Kemp. It seems the complaint was not properly a complaint of an offence coming under the statute, and therefore the justice could not justify under the conviction.

The jury gave a verdict for plaintiff. £7 10s. damages.

At the trial, it was objected that the notice of action was insufficient. It was not endorsed with the name and place of abode of plaintiff's attorney, but the notice itself read thus.

"To Thomas W. Walsh, Esq., one of Her Majesty's justices of the peace, acting in and for the Talbot District:

"S^r,"—I do hereby, as the attorney of John Bates, of the

township of Woodhouse in the Talbot District, labourer, give you notice according to the form of the statute in that case made and provided, that I shall at or soon after term, cause a writ of *capias ad respondendum* to be sued out of Her Majesty's Court of Queen's Bench, at Toronto, against you, at the suit of the said John Bates, for false imprisonment; for that you, on or about, &c., by warrant under your hand and seal, and dated, &c., did cause the said John Bates to be apprehended and imprisoned in the Court House in the town of Simcoe, and to be kept and detained there two days without any reasonable or probable cause, to his damage £200." And at the foot of this notice was written,

"Dated the 15th day of January, 1849.

Yours, &c.

G. R. VAN NORMAN,
Attorney for the said John Bates,
Simcoe, Talbot District."

The only objection to the notice taken at the trial, was that the statute was not complied with, so far as regarded the subscription of the name of the attorney and his place of abode.

There was leave reserved to the defendant to move for a nonsuit on this objection.

Galt obtained a rule for a nonsuit, on the leave reserved. *Read* shewed cause.

The authorities cited were—3 B. & P. 555; 7 T. R. 635; 3 U. C. R. 115; the English Act 24 Geo. 2 Ch. 44; the Provincial Act 4 Will. IV. ch. 4, sec. 21.

ROBINSON, C. J., delivered the judgment of the court.

The questions are, first, whether the notice required to be given in this case, must contain the requisites of that directed by the English Stat. 24 Geo. II.

Second,—If so, then whether this notice would be sufficient under that statute.

In the case of *Madden v. Shewer* in this court 2 U. C. Reports, 115, we held, that when the legislature in this province, have required notice of action to be given to a

magistrate, without specifying any of the requisites of such notice, we must intend that they meant that kind of notice which the English statute 24 Geo. II. ch. 24, prescribes; otherwise there would be no certain guide as to the degree of information which the note should convey.

The form of the notice under the English Act has been always well known here; because it has been always held necessary to give it, in cases of actions against magistrates, for anything done in the discharge of their ordinary criminal jurisdiction, such as would in England require a notice to be given under that act, and where our legislature had made no special provision. And where the legislature, as in this case, in requiring some new duty from a magistrate, the performance of which may expose him, in case of any inadvertent slip, to an action,—provides that a month's notice of action shall be given to him, without specifying what particulars the notice shall contain, we intend them to mean such a notice as had before in other cases been required to be given.

Now, the provincial statute, under which this defendant was acting, 4 Will. IV. ch. 4, sec. 21, provides only that “notice of action and of the cause thereof, shall be given one month before the action be brought.” But as we must see that the object of such notice must be to give the justice a fair opportunity to stop proceedings, by tendering reasonable amends for the wrong complained of, we think that we must construe the statutes together, and hold that the notice required by the 4 Will. IV. to be given, must, like that required by the more general act 24 Geo. II. ch. 44, be a notice in which “shall be clearly and explicitly stated the cause of action which such party hath, or claimeth to have, against such justice of the peace, and that on the back of it shall be endorsed the name of the attorney or agent who gives it, together with the place of his abode.”

It would be unreasonable to suppose that the legislature could mean, that in some cases the justice should be informed to whom and where he may go, in order to tender amends: and that in other cases he need not be so informed though the object of the notice must be the same in all.

When the legislature speaks, in 4 Will. IV., of "notice of action" to a justice, they spoke of a notice, of which the form was already familiarly known, and which they therefore omitted to describe particularly.

Then, would this notice be sufficient under the 24 Geo. II.? I think we must hold not. The case of *Taylor v. Fenwick*, cited in *Lovelace v. Curry*, 7. T. R. 635, and reported in 3 Dougl. 178, is in point.

I do not think that the residence being at the foot of the notice, instead of on the back, would signify, though it would be quite as easy and much better to comply exactly with the statute in this respect. But we cannot say that the notice clearly disclosed the place of residence of the attorney. It does not import any thing more than that the notice was written there. It stands as a mere date, and does not express that it is the place of residence of the attorney. —See *Cook v. Curry*, 1 Tidd's Pr. 28; 3 B. & P. 555, note; 2 Campb. 199.

Per Cur.—Rule absolute for nonsuit, on leave reserved.

DOE DEM. PETIT V. RENARD.

The lessor of the plaintiff proved a patent from the Crown, which had been in his possession since 1803.—The defendant claimed under a deed from one A. to B. in 1806.—A. was not shewn to have been in possession—and no deed from the lessor to A. was produced—nor any evidence given that he had ever executed such a deed. The facts proved, only went to shew a bare possibility that he might have done so. The jury, however, upon these facts being left to them as very slight evidence of the patentee's having made a deed to A. found for the defendant; but *held Per Cur.*—that the verdict must be set aside without costs—there being no legal evidence to be left to the jury on the facts stated, to shew an alienation by the patentee.

The Crown made a grant of the whole lot 23, in 1803, to the lessor of the plaintiff, which patent had always remained in his custody, and was produced by him on the trial.

No conveyance from him to any person, was either produced or proved to have been made. It was shewn that in 1806, one Ellison had made a deed of the whole lot to Haggai Wesbrooke, and that in 1846, Abraham Wesbrooke, as heir of Haggai Wesbrooke, conveyed the premises now in question, (the south half of the lot,) to the defendant. But what connection Ellison had with the title was not shewn, nor that he was ever in possession.

The evidence did not shew a possession of the lot for twenty years by the defendant, and those under whom he claimed, nor indeed by any one, for this half of the lot had lain unoccupied till within thirteen or fourteen years.

A witness was called on the part of the defendant, who swore that he knew Ellison about forty years ago; that he went about that time to the United States; that he remembered, about forty or forty-one years ago, Ellison's going to the part of the country where the lessor of the plaintiff lived, to buy land, as he said, in Townsend, and the witness said he was under the impression that when he returned, witness saw in his possession a deed from Petit to him, for a lot of land in what is called the Boston settlement, which is in Townsend; but the witness knew nothing of the number of the lot, and only swore from a vague indistinct recollection.

Upon this evidence the jury took upon them to infer, that there had been a deed duly executed by the lessor of the plaintiff to Ellison, for the land in question, without any attempt being made to account for its non-production, or to prove its execution, and without other evidence than this, of the execution of any such deed.

The learned judge remarked to the jury, that the evidence of the lessor of the plaintiff having alienated the land, was very slight, scarcely amounting to legal evidence; but it was left to them, and they found for the defendant.

Freeman, of Hamilton, obtained a rule for a new trial, on the law and evidence, and for the reception of illegal evidence.

Duggan shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are clear that in this case there ought to be a new trial without costs.

There really was no legal evidence to shew that the lessor of the plaintiff, who had received a patent for this land from the Crown, had ever parted with the estate, or with any portion of his interest.

The utmost that can be said is, that there is some reason to apprehend that he may have done so; that there are cir-

cumstances which look like it—the chief of which is, that in more than forty years, he seems not to have looked after his land, or acted as if he were the owner, though the patent still remained with him—but no deed from him to any person was produced, and no evidence that he had ever executed any such deed, still less that such a deed had been lost or destroyed, and proof of its contents given.

Not being dispossessed by any one, in such a manner and for such a time as bars him under the Statute of Limitations, he is entitled to be regarded as the owner, till some legal evidence of his having alienated the land shall be given.

Per Cur.—Rule absolute for new trial without costs.

HENDERSON V. HUNT.

Entry of record after the first day of the assizes.

The judge of Nisi Prius has a discretion, under our Rules of Court, to permit a record to be received and entered for trial, without the consent of the defendant, after the first day of the assizes.

Case for maliciously swearing articles of the peace against the plaintiff without cause.

Plea—general issue.

Verdict for plaintiff, 12*l.* 10*s.* damages.

Defendant moved for new trial on affidavits only, and that the plaintiff should be ordered to pay him the costs of the day, for not proceeding to trial in a regular manner pursuant to notice, or countermanding the notice, the cause not having been entered for trial until after the first day of assizes, and after the commission day of the assizes, and that the order of Mr. Justice Sullivan, allowing the cause to remain on the list for trial, be rescinded.

Venue laid in the district of Talbot. Friday, 11th May, was the commission day.

Owing to the pressure of business at Woodstock, where the assizes were holden next before, Mr. Justice Sullivan did not open the Court at Simcoe in the district of Talbot, until Saturday 12th May, in the evening. On Monday morning the plaintiff's attorney arrived at Simcoe, having been given to understand by the authority of the judge, that the assizes would not open until that day. The assizes at Woodstock

closing sooner than was expected, Mr. Justice Sullivan was enabled to arrive at Simcoe on Saturday evening, and opened the court merely on that day, no business being done.

On Monday morning Mr. Justice Sullivan having, on the application of the plaintiff's attorney, allowed this cause to be entered, the defendant's counsel moved that the cause (with others entered under similar circumstances) be struck off the list, as being entered contrary to the rule of this court, Hilary Term, 7 Geo. IV., after the day of opening the court, and without the assent of the defendant. The learned judge considered that the rule referred to did not apply, where the court was not opened on the day appointed in the commission, but had been adjourned by the sheriff under the power given by the statute 7 Wm. IV., c. 1, sec. 9. in the absence of the judge and clerk of assize. He thought he might in his discretion, under such circumstances, allow the record to be entered, and as there was reason to believe that the plaintiff's attorney had been misled by information that the court would not open till Monday, he directed the record to be received and entered.

The defendant's counsel objected, but nevertheless appeared and made a full defence at the trial, calling witnesses and addressing the jury.

ROBINSON, C. J., delivered the judgment of the court.

This application is grounded on the assumption that our rule of court, Hilary Term, 7 Geo. IV., is so peremptory, that the judge of assize has no discretion to relieve against it, by making an exception under any possible circumstances.

I have not so considered it, and it might in some cases be most inconvenient, if no discretion could be exercised in allowing a cause to be entered after the first day. The rule, to be sure, does not in terms give any discretion: "It directs that no cause shall be tried at the assizes for any district, unless the record at Nisi Prius is delivered on *the commission day*, or first day after the court, to the marshall."

But a rule of M. T. 3 Vict. provides, in as positive terms, that the causes at Nisi Prius, "shall be called and tried in

the order in which they stand in the docket, and according to the practice in England."

We have been in the habit of relaxing upon good reasons appearing, in regard to the latter rule; and I do not know why the same discretion to make exceptions in the other case should not be exercised where justice requires it.

The English rule, which is one of all the courts made in Hilary Term, 14 Geo. II, is in terms more peremptory even than ours. It runs thus: "It is ordered by all the judges in England, that no writ or record of Nisi Prius shall be received at the assizes in any county in England, unless they shall be delivered to be entered with the marshal before the first sitting of the court after the commission day, except in the counties of York and Norfolk, and there the writs and records shall be delivered to, and entered with, the marshal, before the first sitting of the court on the second day after the commission day; *otherwise they shall not be received.*" The same rule provides, "that every cause shall be tried in the order in which it shall be entered, without any preference or delay, unless it shall be made out, to the satisfaction of the judge in open court, that it is impracticable or inconvenient so to do; who thereupon may make such order for the trial of the cause so put off as to him shall seem just."

The very giving a discretion in regard to the order of trial, while none is given in regard to the time of entering causes, makes it more difficult to allow of any discretion in the latter respect under the English rule than under ours; and then the English rule has the negative words, which ours has not: "*otherwise they shall not be received.*"

In two collections which I have of the old English rules of court, the rule signed by all the judges is given exactly as I have reported it. Yet, the books of practice say, that the judge sitting at Nisi Prius, may in his discretion and under particular circumstances, allow his marshal to receive a record and enter it for trial after the time limited by the rule; but that he will seldom allow it. The case of *Skeye v. Voyce*, 3 Campb. 365, confirms this.

We think the judge had a discretion to allow the record

to be received (which indeed is not prohibited by our rule,) after the first day, and to *permit the cause to be tried*, and that the discretion was not so exercised as to subject the defendant for any thing that appears to any disadvantage.

The detention of the judge, and the uncertainty it would create, supplied a reason for being less rigid than under ordinary circumstances, when it could not be shewn that the other party would suffer from absence of counsel or witnesses, or any other cause.

We discharge the rule, independently of any consideration of the effect of the defendant having, after objecting to the entry of the record, nevertheless appeared and made full defence at the trial, and independently also of any consideration whether our rule was, or was not equally applicable on this occasion, when the court did not meet on the day appointed in the commission as on other occasions.

As to that part of the rule nisi in this case, which asks for the costs of the day for not going to trial, in case we had thought it right to set aside the verdict, it would have been contrary to authority, as well as to reason, to have made such an order under the circumstances, for the defendant has been strenuously labouring to prevent the cause coming on.

Per Cur.—Rule discharged.

LAI V. STALL.

Sales on Sunday—Statute 8 Vic. 10, sec. 2.

Under the 2nd clause of the 8th Vic. 10, all sales of real and personal property, made on a Sunday, are void.

Semble—That mortgages would not be void.

Trover for horses, waggon and harness.

Pleas:—1st. Not guilty.

2nd. Plaintiff not possessed of the goods.

The plaintiff owned the goods in question on the 15th of April, 1848, and on that day sold them as he alleged to one Wildt, but on the condition that they should be paid for by the 1st of September, 1848, and, if not, that the goods were then to be restored to the plaintiff. At the time of the

transaction, Wildt was living with plaintiff on plaintiff's farm.

A sealed writing was put in and proved at the trial, according to which Wildt on that day (15th April, 1848) gave the goods in question to the plaintiff Lai, together with other things mentioned in an inventory, and also all the grain and stock upon the farm of Nicholas Lai (not specified in the inventory), valued in all at £78 15s. to hold the property, until such time as Wildt should pay to Lai the said £78 15s. "and upon payment, the goods (it was said in the agreement) shall be restored to Wildt by Lai."

Lai had also bargained with Wildt to sell him the land, and afterwards left the place and went to reside elsewhere—Wildt using the property in question on the farm as his own.

It was proved that Wildt represented himself to be in expectation of receiving money from Europe to pay for the farm and property, but was disappointed; and that, after living upon the farm till after harvest, and using the personal property mentioned in the writing as his own, he left the farm at midnight, taking the horses, wagon, &c., with him.

A mare, waggon and harness, which had been thus removed, was sold by Wildt to this defendant, from whom the plaintiff in October, 1848, demanded it; and, in consequence of the defendant's refusal to give it up, this action was brought. The mare, &c., was sold by an agent of Wildt, who gave him instructions to dispose of them; and only £15 was paid by the defendant on account of his purchase.

At the trial, the plaintiff founded his claim to recover upon the contents of the sealed writing, which stated the transaction as if the goods had been originally Wildt's, and mortgaged to the plaintiff for a debt, instead of resting his claim on his own original property in the goods, and on the fact that he had not sold them to Wildt, but only agreed to let him have them on the 1st of September in case they should be then paid for, and that in the mean time the property should remain in him, Lai.

It was proved that the written agreement was executed on a Sunday, and it was objected by the defendant that it was therefore void under the statute 8 Vic. ch. 45, sec. 2, being a contract for the sale of personal property on the Lord's day, made contrary to the statute. It was agreed that a nonsuit should be entered if this court should be of the opinion that the plaintiff's right depended wholly on the written instrument, and that the instrument was void under the statute.

Verdict for the plaintiff, £35.

J. Duggan obtained a rule for nonsuit, on leave reserved. *Freeman*, of Hamilton, shewed cause. Cases and statutes cited on the argument—8 Vic. chap. 45; English Act, 29 Car. II. chap. 7; 1 Taunt. 131; Com. Dig. Temps. B. 3.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the second clause of the statute 8 Vic. ch. 45, goes further than the first clause, and does prohibit all sales of real and personal property on the Lord's day, and not merely such as may take place within the ordinary calling of the vendor.

The legislature could undoubtedly restrain, if they pleased, any trafficking whatever on the Lord's day, as an indecent violation of the sanctity of the Sabbath; and the words of the act are so comprehensive and so plain that we cannot set limits to them.

The English statute 29 Car. II. ch. 7, is very different in its terms, and could not, consistently with plain grammatical construction, have been extended further than they have been in the cases which have been decided under the act.—1 Taunt. 131.—Com. Dig. Temps. B. 3.

If upon the whole evidence we could say that the transaction that took place in this case on a Sunday, was only a mortgage of personal property, then, perhaps, we could not hold it to be void under the statute, because that would not be literally a sale. It is sales only that are made void; and this being a penal act, we cannot extend it by construction to cases not within the letter, but it is at least plain that every sale or agreement for a sale on the Lord's day, is prohibited; and, in order to give due effect to the act which is

passed for objects of public policy, we are not to be estopped by the writing from looking into the real truth of the transaction, and then we find by evidence that there was first a sale by Lai to Wildt on the Sunday of the property in question, which, up to that time, Lai had owned, and this being void under the statute, the goods remained his as much as if no such transaction had taken place; so that the question is not merely whether the mortgage back to Lai, which was given on the same day, is void. This shews the verdict to be right as it is, and the rule is therefore discharged. The verdict is in other respects consistent with the real justice of the case.

Per Cur.—Rule absolute,

BURNS & DUGGAN V. HARPER.

Variance.

Held Per Cur.—That the following note—"Four months after date, I prmise to pay to *my own order*, at the office of the Commercial Bank here, £23 16s. 2d., value received," and endorsed by the maker, could not be declared upon as a note payable "*to the plaintiffs or bearer*."

Semle—That a note in this form when endorsed by the maker, becomes a note payable generally to bearer—but not to any *particular* person.

The plaintiffs declared on a note of the defendant, made the 26th April, 1848, promising to pay to the *plaintiffs or bearer*, 23l. 16s. 2d. in four months, and that the defendant then duly assigned and delivered the same to the plaintiffs, who then became, and now are, the holders thereof, by reason whereof the defendant became liable to pay the amount of the said note to the plaintiffs.

The note ran thus:

"Toronto, 26th April, 1848.

Four months after date, I promise to pay to my own order, at the office of the Commercial Bank here, 23l. 16s. 2d. cy., value received.

(Signed,) JOHN HARPER."

And it was endorsed by Harper in the usual manner.

The jury gave a verdict for the plaintiffs, for the balance due upon the note, 11l. 5s. 10d.

A. McLean moved for a new trial on the law and evidence, and for misdirection. J. Duggan shewed cause.

The authorities cited were—12 Jur. 270, 447, 678; 17

L. J. C. P. 281; do. Exch. 315; 16 M. & W. 51; 16 L. J. 446.

ROBINSON, C. J., delivered the judgment of the court.

We regret to be obliged to hold, that the objection of variance in setting out this note in the declaration is entitled to succeed, and that having been made at the trial, we are bound to give effect to it.

It might have been successfully contended on the authority of several recent decisions, that the plaintiff was at liberty to declare on this writing as on a promissory note, payable generally to the bearer, for that was the effect, when, in the body of the paper he promised to pay to his own order, and then wrote his name on the back. That indorsement, taken in connection with the note, has been held to amount to a promise to pay to any holder of the note, in other words, to the bearer; but whether we shall adopt the view of the Queen's Bench in England, as explained in *Wood v. Mytton*, or that taken by the courts of Exchequer in *Flight v. McLean*, 16 M. & W. 37., and *Hooper v. Williams*, 12 Jurist, 270, or by the Common Pleas in *Brown v. De Winton*, and *Gay v. Lander*, 12 Jurist, 679, this declaration would equally be at variance with the instrument produced.

When the plaintiffs state that the defendant made their promissory note, promising to pay to Messrs. Burns & Duggan, or bearer, 23*l.* 16*s.* 2*d.* they undertake to shew a note exhibiting such a promise, but the names of Burns & Duggan nowhere appear on the paper. It is matter of description, and the variance is fatal. It does not, we think, come within the rule which generally applies, that a plaintiff may set out a written instrument according to its legal effect, for that means its legal effect as apparent on the writing; and besides the effect of what was in fact done by the defendant, was to make a note payable to the bearer in the widest terms, without reference to any particular person.

On the effect of a variance of this kind, in setting out a written instrument, I refer to *Hoar v. Mill*, 4 M. & Sel. 470.

Per Cur.—Rule absolute.

SCOTT V. FRALICK.

Held per Cur.—That the covenant of the grantor that he has good right to convey—is a covenant running with the land—and that it is no objection to an action upon such a covenant by the assignee of the covenantee against the original covenantor—that because, according to the averment in the declaration, the covenant was broken *eo instanti* that it was made, it could not therefore be assigned and sued upon by the assignee.

This was an action for breach of covenant, brought by the assignee of the covenantee against the original covenantor, in which the breach assigned was that the covenantor “had not good right and authority to grant, bargain, sell and transfer the said parcel of land to the said A. B., his heirs and assigns, &c.”

Demurrer to declaration—that it appeared by the declaration that the covenant declared upon was broken *eo instanti* that it was made, and that a cause of action for a previously existing breach of covenant was incapable of assignment, and could not be sued upon by an assignee of the covenant.

ROBINSON, C. J., delivered the judgment of the court.

The judgment which we very recently gave in *Gamble et al. v. Rees*, 6 U. C. R. 396, has been taken, I believe, as deciding this case, which in effect it does—for the declaration here states a case even more clearly in favor of the plaintiff.

There would be no use or meaning in the principle of a covenant running with the land, if the plaintiff had not a good right of action upon the facts stated in this declaration. See 2 Cr. M. & R. 588; Cro. Eliz. 373, 433; 1 N. R. 172; 4 M. & Sel. 53; 5 Taunt. 483.

Per Cur.—Judgment for the plaintiff on demurrer.

GRANTHAM V. JARVIS.

Upon the plea of *nul tiel* record being pleaded by the defendant, the issue is complete, and it is unnecessary for the plaintiff to reply—but if he should do so, and pray an inspection, and the defendant should demur, on the ground of informality—though the replication be unnecessary—the defendant might have judgment on demurrer. The demurrer to this replication was held bad—the grounds taken being insufficient.

A plea by the sheriff to an action for a false return to a writ of *fi. fa.*—set out in the declaration—that there was no writ of *fi. fa.* against A. B.’s goods *duly* sued out and *duly* returned—is bad.

A plea by the plaintiff that he did not seize any of the plaintiff’s “goods” without adding “or chattels”—is good on special demurrer.

The sheriff, sued by the execution creditor for a false return, cannot plead ~~to the merits of~~ the original action.

Declaration : Case against the sheriff of the Home District for a false return to a writ of *fi. fa.* against the goods and chattels of one Wm. Barchard.

1st plea.—*Nul tiel* record.

2d plea.—That no writ of *fi. fa.* against Barchard's goods was *duly* sued out and *duly* returned.

3d plea.—That defendant did not seize any of the plaintiff's goods, (without adding "or chattels").

4th plea.—*Nul tiel* record, to the judgment of this court, set forth in the declaration, concluding with a prayer of judgment.

8th plea.—A plea in substance, by the plaintiff, to the merits of the original action.

Demurrer to 1st plea.—That it professes to answer the whole declaration, while it only answers the first count.

Demurrer to 2d plea.—Because it does not traverse that the writ as set out issued, but that no writ was issued ; also, because the traverse is of matters of practice, which cannot thus be put in issue.

Demurrer to 3d plea.—Because it does not answer the seizing of the chattels, but only the "goods."

Demurrer to 8th plea.—Because the plea in substance is a plea to the merits of the original action.

Replication to 4th plea.—The plaintiff prays that the record of the said judgment recovered, set forth, may be inspected and seen by the said court, when and where the said court may order and direct.

Demurrer to replication to 4th plea.—Because it does not allege the existence of the record, which is denied in the 4th plea ; and because it does not name a day on which the supposed record may be inspected by the court.

Eccles and *Hawke* for the demurrer. *Gamble* contra. The authorities cited were : 1 U. C. R. 467 ; 8 B & C. 217 ; Peake's N. P. C. 65 ; 5 R. & C. 664 ; 16 E. R. 39 ; 7 B. C. 800 ; 2 G. & D. 212 ; 11 A. & E. 539 ; 1 Saund. 92 ; 2 Wils. 113 ; 2 Salk. 566 ; 2 B & P. 302 ; 1 Ld. Ray. 550 ; 1 M. & Gr. 288 ; Cro. Eliz. 386 ; 3 Leo. 243 ; 7 Taunt. 30.

ROBINSON, C. J., delivered the judgment of the court.

The replication to the defendant's 4th plea is demurred to. That plea is the common one of *nil tiel* record to the judgment of this court, set forth in the declaration; and concludes with a prayer of judgment, as is proper.—2 Chitty Pl. 211; 1 Lord Ray. 550; 2 B. & P. 302; 2 Wils. 113.

The defendant might have given a day to bring in the record, which would have made a complete issue.

The plaintiff unnecessarily replies, and instead of following any approved form of pleading used in such cases, which would save much trouble and expense, prays that the record may be inspected; to which the defendant demurs.

If the plaintiff had replied that there is such a record, and added the prayer to inspect, as the defendant had not done it, there would have been no pretence for the demurrer, though in strictness such a replication was not necessary. As it stands, the defendant treats the prayer for inspection of the record as an answer to his plea, and demurs to it, which is nothing but denying that the court can inspect the records in the court before them; wherefore the plaintiff must have judgment on the demurrer. The case is quite similar to that of *Moore v. Bail of Garret*, 2 Salk. 566. *Tipping v. Johnson*, 2 B. & P. 302; *Sanford & Rogers*, 2 Wils. 113, and *Cremer v. Wicket*, 1 Lord Raymond, 550; shew that the issue was complete in this case upon the defendant's plea; and the court might have given a day to bring in the record without more being said by the plaintiff.

Then as respects the pleas demurred to: The first plea is not supported, being clearly bad in form, for not being confined in terms to the first count, to which alone it applies.

The second plea avers that there was no writ of *fi. fa.* against Barchard's goods duly sued out and duly returned. It does not merely traverse that any such writ as is set out in the count did issue. I have no doubt that the plaintiff is entitled to judgment on this plea.—1 U. C. Rep. 468; 1 D. & R. 30; 1 Dowl. 661; 7 B. & C. 800.

In *Dudley v. Watchorne*, 16 E. R. 39, which the defendant relies upon, the question was altogether different, for that was an action against bail, who could not be charged till

it was shewn that the body of their principal had been duly demanded according to the practice of the court, which made it indispensable that a *ca. sa.* should have been sued into the proper county.

Here the sheriff is sued for a false return of a *fi. fa.* The gist of the action is the alleged false return, and it does not lie in his mouth to put the plaintiff to prove that his writ issued according to the regular practice of the court. He cannot thus tender an issue upon matters of practice; and the plea is on other grounds bad.

It is no answer to this action for a false return, to allege that the writ was not duly returned. If he did not make the return of *nulla bona* complained of, he might have traversed that, but he can have nothing to answer respecting the return, except that he did not make such a return, or that it was true, or that it was made by the plaintiff's desire.

The third plea is demurred to, because the defendant, intending (as I suppose) to deny that he had seized any thing of the plaintiff's under the writ, pleads that he did not seize any of his "goods," without adding "or chattels." Here again, a pretence for raising an idle cavil, is furnished by an unnecessary departure from the words of the declaration and of the writ, which ought to have been followed; but we cannot say, I think, upon clear ground, that there is anything in the exception.

In *Putman v. Willis*, 1 Cro. Eliz. 386, the court was divided upon the point whether "*bona*" would not extend to all that "*catalla*" would embrace. *Shep. Touch.* 97; *Vin. Abr.* Grant W.

We have Lord Coke's express authority for holding that the word "goods" does include leases for years, and all that can be called chattels—*Co. Lit.* 118 (b); and in the face of this authority we shall not hold the plea bad, though there are dicta to the contrary.

The fifth plea is bad for the same reason as the second.

The eighth plea we consider clearly bad, for the sheriff cannot be allowed to plead to the merits of the original action, which is the effect of this plea.

DOE EX DEM. EBERTS V. MONTREUIL.

A husband entitled to land in right of his wife, may bring ejectment without her being joined in the action.

A conveyance in fee to A. by B., the survivor of two joint tenants, "*of his undivided half of the lot,*" puts an end to the joint tenancy, and makes the joint tenant B. till he dies, a tenant in common with A., and B. by his will may devise the moiety he has not by his deed conveyed to A.

This was an action of ejectment to recover possession of one-fifth part of the undivided half of lot number four in the first concession, east side of the river Puces, in the township of Maidstone, in the Western District.

The defendant pleaded not guilty.

The cause came on to be tried before the honorable Mr. Justice Macaulay, at the last spring assizes, for the Western District.

For the plaintiff the following facts were proved or admitted, viz.: That a patent from the crown for the land in dispute, issued to George Meldrum and William Park, dated the 10th August, 1801; that Parke died without having made any partition of his lands thus held with Meldrum; that Meldrum then died intestate; that John Meldrum (eldest son and heir-at-law of the said George Meldrum) devised all his real and personal property to his children, share and share alike, and died; that the lessor of the plaintiff is the husband of one of these children. The will of John Meldrum, the heir-at-law aforesaid, was not registered until a few years ago; but the title had never been a registered one, save as appeared by the deeds put in for the defence.

For the defendant, it was submitted by *Becher* of London, that if a tenancy in common were created under the patent, the title was altogether out of the lessor of the plaintiff, by deed of John Meldrum to one Chenier; that if a joint tenancy were created, the conveyance from Meldrum, heir-at-law, to Chenier, created a joint tenancy, and Meldrum could not make the will under which plaintiff claims—Meldrum having died before Chenier; that if this were so, the will was cut out by a conveyance from the heir-at-law of John Meldrum to Charles Baby, and by him reciting a bond to McKnight, for non-registry, there being no impedi-

ment in the way of registration, the will being at Detroit. *Mr. Becher* moved also for a nonsuit, on the ground that as plaintiff claims in right of his wife, she should be joined in the action.

Verdict for plaintiff, by consent, subject to the opinion of the courts on these points.

ROBINSON, C. J., delivered the judgment of the court.

It is plain that the patent for this land to Meldrum and Parke, made in August, 1801, constituted them joint tenants; the stat. 43 Geo. IV. ch. 4, not extending to any patent of so late a date.

We have no doubt that the husband of Mrs. Eberts can rightly recover in respect to his wife's interest, without joining her in the action, for the only effect of a recovery is to determine his right to the possession, which he undoubtedly must have, if her title is good. He could make a lease, beyond doubt, and can therefore bring ejectment.

As to the title: Meldrum became sole seized on Park's death, and dying intestate, his son John Meldrum became sole seized as his heir; and in April, 1829, he John Meldrum made his will, under which the lessor of the plaintiff claims a present interest and right of possession, in respect to an undivided fifth part of an undivided moiety of this lot number four, in the first concession east of the river Puces, in Maidstone, being a devisee with the other children of the father John Meldrum under this will.

The title is clear so far; but it is shewn on the defendant's part, that in May, 1829, John Meldrum, then still living, made a conveyance in fee to one F. B. Chenier, which the defendant contends divested him of all his interest in this lot.

Of course if that were so, no interest could pass to his devisees under the will when he afterwards died. But there is no ground for saying that the deed to Chenier conveyed anything more to him than an undivided half of the lot. The language is express to that effect. It may be that the testator supposed he was conveying all the interest he had in the lot, and meant to do so, believing, I dare say, that if Meldrum and Park were partners, each owned half

of the land, and perhaps, also, thinking them seised as tenants in common, or which is more likely, knowing nothing of such distinctions.

But whatever would be held or done in equity in such a case, with respect to real estate held by partners, a court of law can only look to the legal title, and no doubt that survived wholly to Meldrum the elder, when Park died.

It may be that John Meldrum, if he had known this, would still have sold the whole lot, and not an undivided half only to Chenier, though not at the same price; but we cannot speculate on what he might have done, we can only deal with what he has done: and his deed, without doubt, merely conveys the moiety, and the other moiety remained in him and passed by his will.

It is out of the question to argue that Chenier's deed could have had any other effect than to leave John Meldrum till he died tenant, in common with Chenier, of the lot; it put an end to the joint tenancy, and left the moiety not conveyed to pass by his will.

Then, there is no difficulty from the effect of the registry act, for John Meldrum dying seised of this moiety, his will carried it, though unregistered, so long as no person is in a situation to set up a better title under a subsequent deed first registered.

All must turn in this case on the effect of the deed to Chenier, and we have no doubt that it cannot affect this moiety, and that the plaintiff is entitled to the postea.

Per Cur.—Plaintiff entitled to the postea.

SHUTTLEWORTH V. SHAW AND SHAW.

Abatement of rent, sought for by the defendant, upon the ground that he had been evicted from a road forming an appurtenance to the land leased; but *Held per Cur.*, that under the evidence, the road could not be looked upon as an appurtenance, and that there had been consequently no eviction.

Action for rent.

The plaintiff declared, that by indenture of 24th March, 1846, he demised to defendants a certain messuage or dwelling-house, shop and premises, with the appurtenances, situate in the city of Toronto, and described in the indenture; to hold from 9thth May, 1846, for five years, yielding

every year the rent of 90*l.*, by four equal payments, to be made 9th August, 9th November, 9th February, and 9th May—the first payment to fall due on 9th August, 1846; and he set out a covenant to pay the rent, averred performance of all things on the plaintiff's part, and stated as a breach, that on the 9th May, 1848, 22*l.* 10*s.* rent became due, of which the defendant had paid 20*l.* leaving 2*l.* 10*s.* unpaid.

2ndly. That on the 9th of August, 1848, another 22*l.* 10*s.* became due.

3rdly. On 9th November, 1848, another 22*l.* 10*s.*: which sums all remained unpaid, contrary to the true intent and meaning of the said covenant, whereby an action had accrued to the plaintiff to demand from the defendant the said several sums of money, amounting together to 47*l.* 10*s.*, yet that the defendant had not paid the same or any part thereof, to the plaintiff's damage of 50*l.*

The defendants plead—

1st. To the breach first assigned, namely, in not paying the 2*l.* 10*s.*, due on the 9th of May, 1848, that before and at the time of the indenture, and from thence until upon and after the 9th May, 1848, L. P. S. was seised in fee "*of a certain road, leading from and out of the said demised premises in the declaration mentioned, to a certain public road or highway in the said city of Toronto, called Wellington Street, and which said first-mentioned road or way was part and parcel of the said demised premises, and enjoyed as such and appurtenant thereto.*"

And the plea went on to state, that during the tenancy, and *before the 9th of May, 1848*, the said L. P. S., as he lawfully might, entered into the said first-mentioned road or way, *part of the said demised premises, as aforesaid*, and then ejected, expelled, put out and removed the defendants from the use and possession thereof, and kept and continued them so expelled, &c., from thence hitherto.

The plaintiff replied to this plea, that the said road or way in that plea mentioned, "*was not part of the said demised premises, or enjoyed as such, or appurtenant thereto,*" and concluded to the country.

To the breaches secondly and thirdly assigned, the defendants pleaded the same defence; and to these pleas the plaintiffs demurred.

The case was taken down to trial before the Chief Justice, at the last assizes for Toronto, and he directed the jury on the evidence to find a verdict for the plaintiff for the amount of rent claimed, and to assess what damages they might think it just should be deducted, if the court should be of opinion that in this action and upon the pleadings and evidence there could be an apportionment of the rent on any of the breaches, on account of the alleged eviction.

Upon the only issue of fact to be tried, which was in respect of the first breach, the Chief Justice considered at the trial that the plaintiff was entitled to the 2*l.* 10*s.* claimed; the only question which the jury had to try was, "whether the road, leading from and out of the demised premises to Wellington Street, was or was not *part of the said demised premises, or enjoyed as such or appurtenant thereto.*" Verdict for the plaintiff.

Crooks obtained a rule for a new trial, on the ground of misdirection. *A. Wilson* shewed cause. The authorities cited were—3 Taunt. 30; 1 Taunt. 205; Buller's N. P. 165; Selwyn's N. P. 522, (9th edit.); 2 E. R. 575.

ROBINSON, C. J., delivered the judgment of the court.

The defendant was bound to prove so much of the plea as was necessary to make it a good bar to the action—not all of it.—3 Vin. Ab. 5. Unless the road spoken of was shewn to be part of the premises demised, it could not be held that eviction from it could work any abatement in the rent, even if the action were debt and not covenant, as I think we must hold it to be; or if being in covenant, it were between the lessor and an assignee of his lessee, instead of being, as it is, an action brought upon the express covenant alone, and independently of the privity of estate.—2 E. R. 575.

Then we must enquire, what is demised? The lease is of all "that certain three-story brick messuage or dwelling-house, shop and premises, situated on the east side of Yonge Street, between Wellington Street and Front Street, in the said city of Toronto, and now in the occupation of Thomas Rigney and Company, to have and to hold the said

demised premises, with all the appurtenances thereto belonging, unto the said parties of the second part."

The evidence shewed, that adjacent to the premises demised, was a piece of vacant land, belonging to Mr. Sherwood, over which people had been in the habit of passing at their pleasure, and by which the defendants could conveniently cross from their yard into Wellington Street; and that during the term, Mr. Sherwood had inclosed the land, thereby depriving the defendants and all other persons of a passage over it. No doubt this was an inconvenience to the defendants; it seemed that they complained to the plaintiff about it, who told them that Mr. Sherwood could not legally enclose it, but their assertion proved nothing.

At the trial, *Morris v. Edgington*, 1 Taunton, 30, was relied upon, but it did not seem to me to apply to this case. There, there was something particularized and defined in addition, and as an appurtenant to the building demised; and the question was, whether a certain right of way claimed came within the description of the certain right of way granted. Here nothing is described or defined besides the premises on the east side of Yonge Street, being "now in the occupation of Thomas Rigney & Company, with the appurtenances thereto belonging."

Upon the same principle that the defendants here contend for, whenever a tenant of a house has been allowed the convenience for a time of passing over a piece of vacant land adjoining, belonging to a stranger, which the latter has chosen to leave for a time vacant and uninclosed, then any subsequent tenant taking a lease of the same premises, though it contains no assurance that he should continue to enjoy the same advantage (for indeed the lessor could give him no such assurance), may refuse payment of his rent, because the owner of such vacant land may inclose it, and shut him and all others out from the road, as he may do at any time.

The plaintiff is entitled, in our opinion, to his verdict, and the rule must be discharged.—3 Taunt. 30; 1 Taunt. 205; Bul. N. P. 165 (u); Selw. N. P. 522, ed. 9; 2 E. R. 575.

Per Cur.—Rule discharged.

THOMAS V. MALLORY.

Pleadings—Accord and satisfaction, what amounts to.

Goods, agreed to be accepted *in satisfaction and discharge* of the causes of action in the declaration, and of all damages, &c., must be *actually delivered*. Mere *readiness to deliver* will not do.

Semle—That a plaintiff may, *after breach* of the promise stated in the declaration, legally agree to take *a contract, or new agreement*, to deliver goods, &c., in full *satisfaction* of the *former* promises, and of the damages accruing from the breach of them.

Declaration : Payee against maker of a note.

The fifth plea relied on accord alone without satisfaction, after breach.

After setting out that it was agreed between the plaintiff and the defendant that the plaintiff should advance to the defendant 25*l.* in addition to what the defendant then owed him, and that the defendant should furnish his steamboats with firewood to the amount of the 25*l.* and of the debt which the defendant then owed the plaintiff, at five shillings a cord, to be delivered at a certain place as fast as the steamers should require the same, the plea stated that the defendant was to take receipts for the wood so delivered at the steamboat wharf to the amount, at 5*s.* per cord, of what he owed the plaintiff, and of the further advance of 25*l.*, and that the plaintiff agreed to accept *the same*, that is, the *receipts when delivered*, to the amount of what he then owed (without averring how much that was) and of the 25*l.* in full satisfaction and discharge of what he then owed and of the 25*l.*, and of the moneys in the declaration mentioned, and of all damages arising from the non-performance, &c., &c.

The defendant then averred a delivery of a certain quantity of cord wood, in part performance of the new agreement, but not of the whole, and relied upon it as a sufficient satisfaction that he had kept his agreement, and been always ready and prepared to deliver wood as fast as it was called for.

6th Plea.—In one part this plea stated that the new agreement to deliver wood was agreed to be accepted in satisfaction and discharge of the causes of action in the declaration mentioned, and of all damages, &c.; and in another part it stated that the plaintiff agreed to accept the

performance of the new agreement in full satisfaction and discharge, &c.

7th Plea.—This plea differed from the other two in this, that it did distinctly rely upon the acceptance of the new agreement itself, in satisfaction and discharge, and not upon the performance of it, or upon the readiness to perform; though it did set forth an actual delivery of part of the wood, and readiness at all times to deliver the remainder, as if it were necessary to shew performance in substance of the new agreement.

Demurrer to fifth, sixth and seventh pleas, for causes stated in the judgment or the court.

Hagarty for the demurrer. *Richards* contra.

The authorities cited were: 11 Jur. 1043; 16 L. J. N. S. Ex. 231; 15 M. & W. 680; *Hurlburt v. Thomas*, 3 U. C. R.; 2 Cr. M. & R. 408; 1 M. & W. 323; 7 T. R. 64; 6 T. R. 52; 9 M. & W. 596; 3 Bing. N. C. 915; 1 C. M. & R. 741; *Barnes v. McKay*, 5 U. C. R. 246; 5 M. & W. 289; *Belcher v. Cook*, 4 U. C. R.; 15 M. & W. 23; 3 Dow v. Lownd. 392; 1 M. & W. 153; 4 M. & G. 846; 2 B. & Ad. 328; 3 B. & Ad. 328; 6 Bing. 754; 2 Keble, 851; 1 G. & D. 237; 9 M. & W. 304; 3 M. & Gr. 463 n.; 2 G. & D. 386; 5 B. & Ad. 742; 2 H. Bl. 317; Cro. Car. 408.

ROBINSON, J. C.—Whether reasonably or not, it has always been clearly held that this fifth plea is not a good plea in satisfaction. The goods agreed to be accepted in satisfaction must be actually delivered on the one hand and accepted on the other; mere readiness to deliver will not do; actual satisfaction must be shewn, in order to create the discharge. For according to this plea, it was the certificates of receipt to the full amount of the 25*l.* and the debt, (not shewing what the amount of the latter was,) that were to be taken in satisfaction, and not the new agreement itself.

The sixth plea is double and inconsistent, for in one part it states that the new agreement to deliver wood was agreed to be accepted in satisfaction and discharge of the causes of action in the declaration mentioned, and of all damages, &c.; and in another part it states, that the plain-

tiff agreed to accept the performance of the new agreement in full satisfaction and discharge, so that it is uncertain which the defendant means to rely upon, and he does not shew actual performance by delivering the wood.

With respect to the seventh plea, I consider, though the authorities do not leave the point on very clear ground, that the plaintiff might after breach of the promises stated in the declaration, legally agree to take the contract to deliver wood in full satisfaction of those promises, and of the damage accruing from the breach of them.

A new consideration had been given by the plaintiff, in the 25*l.*, if that were indispensable, though I do not think it was, and he had obtained a new and valid contract, of which he was in a condition immediately to enforce the performance. He could not hold the defendant to this contract and to his former liability at the same time, especially after the new agreement had been partly performed between them, so that they could not resume their original position; but independently of the new consideration of the 25*l.*, and of the circumstance that the parties had acted upon the new agreement which involved the amount of the old debt, I have no doubt that even after the breach the plaintiff could, if he chose, accept in satisfaction of all damages a binding contract to deliver cord wood, such as is set out in these pleas.

I do not think any of the exceptions taken to this plea are entitled to prevail; though it is perhaps subject to some formal exceptions not taken.

After distinctly averring that the agreement to deliver cord wood was accepted in full satisfaction and discharge, &c., it goes on to state part performance and readiness at all times to fulfil, as if that were necessary even were the agreement itself had been, as I think it may be, taken in satisfaction, thereby raising immaterial issues, and leaving it uncertain what is intended to be relied upon; but the plea is not demurred to on that ground.—2 Gale & Da. 286.

As regards the principal ground, this plea is clearly distinguishable from that in the late case cited of *Carter v. Warmould*, 16 L. J. Exch. 231, because the new agreement was not there pleaded in satisfaction. But *Carter v. War-*

mould is an express authority to shew the 5th and 6th pleas bad.

It is taken as an exception to the 7th plea, that it does not state in what sum the defendant was indebted to the plaintiff, and does not therefore shew to what amount the defendant agreed to deliver wood. That exception resolves itself into the question, whether an agreement by one person to deliver to another, when he shall require it, as much cord wood, at 5s. a cord, as will be sufficient to pay whatever debts he then owes to the other, will be an invalid agreement, because the amount of debt is not shewn. I apprehend it would not be.—4 M. & G. 846.

The law leans strongly against holding contracts void for uncertainty, and what was due at that time could always (as we may suppose) be made certain by evidence. Then the agreement, as stated here, is in effect to pay in cord wood the 25*l.* to be newly advanced, and also whatever was due at the time of the agreement on all and every of the promises declared upon, and all the damages that *had then accrued* by reason of their non-performance. If such an agreement was not void for uncertainty, as I think it was not, and was made upon a good consideration, as I think it was, namely, the money newly advanced, and undertaking to advance more, and the old debt which was a continuing consideration, and the forbearance implied in the very terms of the agreement, and the stipulation to find wood at a certain price per cord, which might be an advantage to the plaintiff, then its acceptance, when taken in satisfaction as alleged, extinguished all further claim on account of the old debts, and no further damage on their account could accrue after the new arrangement.

I think, therefore, this 7th plea may be sustained against the exceptions, and that it is good in substance, but it is not pleaded carefully and with the precision which it might have been.

MACAULAY, J.—I concur with the Chief Justice in thinking the 5th and 6th pleas bad on this demurrer.

As to the 7th plea, the promises are laid in the declaration as follows: 1st and 2nd counts, 17th November, 1846;

3rd count, 18th January, 1847; 4th count, &c., 1st July, 1848, for 2100*l.*, in the common *indebitatus* assumpsit. The 7th plea to *the whole*, states that *after making the said promises* in the declaration mentioned in this suit, *to wit*, on the 25th April, 1848, (a day *antecedent* to that laid in the latter counts of the declaration,) it was agreed that to the amount the defendant then owed the plaintiff and 25*l.*, the defendant should deliver cord wood, &c., at 5*s.* a cord.

Now when such agreement was made does not distinctly appear. It is averred to have been after the promises in the declaration mentioned, and if so it must have been *after* breach of those laid in the fourth and subsequent counts, but how long after or how much was then due are equally uncertain.

The plea professing to answer all the demands made in the declaration, pleads matter in accord and satisfaction of what was due at a subsequent period, without averring how much was due, or whether exclusively on the cause of action stated in the declaration, and if so, whether the whole or how much so remained due. The plea does not therefore, in the matter of it, confess and fully answer all it in the introductory part undertakes to answer.

It is uncertain in the following part of the plea, whether the new agreement intended to be pleaded in substitution of the former promises before breach, or in accord and satisfaction of the breach and damages, accrued in consequence of previous breaches thereof. It first states, that for the consideration stated, the plaintiff agreed to accept, receive and substitute the said agreement of the defendant, in the place and stead of the said promises of the defendant in the declaration mentioned, as if before breach; and then proceeds to add, and accept the said agreement in full satisfaction and discharge of all demands sustained by the plaintiff, by reason of the defendant's non-performance of the said promises, (as if already broken) and then adds, "and discharge the defendant from the said promises and the further performance thereof," as if they might still be performed, and the defendant be discharged therefrom; whereas after breach he would be discharged from the

damages arising from the non-performance—not from performance itself of a promise already broken.

It then, with similar inconsistency, avers that at the making of the said agreement the plaintiff accepted, received and substituted the said agreement of the defendant in the place and stead of the said promise of the defendant in the declaration mentioned, (as if not yet broken,) and did accept the said agreement in full satisfaction and discharge of all damages sustained by the plaintiff, by reason of the defendant's non-performance thereof (as if already broken), and did discharge the defendant from the said promise and the further performance thereof, (although the time for performance had elapsed, and the promise been previously broken.) It then unnecessarily—if intended that the agreement itself on the defendant's part and independently of its performance, constituted the consideration for the agreement on the plaintiff's part—proceeds to aver part performance and readiness to fulfil the residue of such agreement on the defendant's part.

I am not prepared to say, that after breach of a promise in simple contract, the right of action thereupon vested in the other party, may not form a perfectly good and valid consideration, as an ingredient in a new agreement, and that the acceptance by the creditor of a new promise, (in other words, a new agreement) on the debtor's part, founded on such consideration and accepted in satisfaction and discharge thereof, irrespective of performance, may not be a good and sufficient discharge of the vested right of action; in short, that a new agreement or promises unperformed may not be accepted in satisfaction of an existing right of action for breach of a simple contract; the discharge on the creditor's part of such breach constituting the consideration on the one side for the new promise on the other. In such a case, the new agreement and acceptance of the new promise would be in accord and satisfaction of the former breach and the damages accrues thereon. But if so, it should be distinctly so pleaded, and not couched in the terms of inconsistency and uncertainty, that the present plea exhibits.

If the defendant wishes to plead a new agreement accepted in satisfaction of the old breaches and damages, he may amend, and do so in distinct terms—shewing what promises and amount of damages he means to answer—and averring the acceptance in satisfaction thereof, without introducing other allegations, rendering it uncertain whether the plea is to the whole sum demanded by the plaintiff or not; whether it is intended to set up the new agreement as substituted before breach, or only accepted in satisfaction of damages afterwards, or whether the new promise by itself, or such promise together with its performance on the defendant's part, was agreed to be so accepted.

DRAPER, J.—Concurred in the opinion that the 5th and 6th pleas were bad, and agreed with Mr. Justice Macaulay in thinking the 7th plea bad.

Per Cur.—Judgment for the plaintiff on demurrer on the 5th, 6th and 7th pleas.

ROBINSON, C. J.—*dissentiente* as to the 7th plea.

DOE FORD ET AL. V. BELL ET AL.

Will—Construction of.

Held per Cur.—Under the following will—(the testator dying before the statute 4 Wm. IV. ch. 1, came into force): “And touching my *worldly estate*—I give and dispose of the same,” &c., &c.; then follow various devises to several children, of certain specified lots of land: then the will goes on “*all other property of which I shall die possessed, and not herein mentioned*, I wish to be equally divided between the five children before named:” the testator then added—“To the Honourable John Kirby, of Kingston, I give and bequeath lot No. 9, in the 7th concession of the township of Nelson and county of Halton—and I appoint the said Kirby one of my executors:” that John Kirby took only an estate for life in lot No. 9,—and, that the reversionary interest in the said lot passed to the residuary devisees—the testator's five children—and not to the heir-at-law.

Special case.

Captain James McKenzie made his will on the 10th of March, 1832, (in which year he afterwards died,) in these terms—after a direction respecting his burial, he proceeds: “And touching my worldly estate, I give and dispose of the same in the following form.” Then follow various devises to the several children, of certain lots of land, described by their numbers, to hold to them severally and the heirs of their body respectively, with limitation over in fee in case of failure of issue.

Then the will goes on thus: "*All other property of which I shall die possessed, and not herein mentioned, I wish to be equally divided*" between the five children before named, but not before the youngest has attained the age of twenty-one years.

The testator then gave directions respecting the education and support of his children which are followed by these words: "To the Honourable John Kirby, of Kingston, I give and bequeath lot No. 9, in the 7th concession of the township of Nelson and county of Halton, and I appoint the said Honorable John Kirby one of my executors." "To John Strange, Esquire, of Kingston, I give my lots of land, north quarter of ten, &c.; I also appoint him one of my executors to this my last will. To John Macaulay, Esquire, I give and bequeath all my books, and I also appoint him one of my executors to this my last will."

The question was, whether under the residuary devise in the will the five children took an estate in fee in the lot in Nelson, devised to the Honourable John Kirby, who is now dead, and who took, as they contended, only a life estate, or whether the estate had devolved on the heir of the testator.

McDonald, Q. C., for the plaintiffs. *Eccles* for the defendant.

Cases cited—2 Wils. 80; Talbot, 157; Cowp. 65, 354; 8 T. R. 503; 16 E. R. 221; 1 Jac. & W. 189; 2 Vern. 460; 3 P. Wm. 63; 3 Mod. 229; 2 B. & P. 343; 5 M. & P. 485; 13 E. R. 527.

ROBINSON, C. J., delivered the judgment of the court.

If the testator had not died till after the statute 4 Wm. IV. chap. 1, came into force, there would be no room for doubt, because then Mr. Kirby would have taken the fee in the lot devised to him, which is what the testator unquestionably meant. As it is, we have to give such effect to this will as would have been given to it by the law of England, before any of the alterations made in the law upon the report of the real property commissioners.

The difficulty is, that while it is averred to be the general and leading principle in these cases, that it is the real will and intention of the testator which must govern, we are

only allowed to discover that intention by the application of certain technical rules, and these often lead us to a decision which we can have no doubt is not in accordance with the testator's meaning.

In the case before us, I have no doubt that the testator imagined that he had fully disposed of his whole interest in whatever parcels of land he had mentioned in his will, and that he meant that his five children should take among them under the residuary devise any lands of which no disposition was made in the will; and that he did not suppose they could under the form of words used, take anything else.

I am equally clear, that whatever real estate there might be which he had not specifically devised, he intended should pass under this residuary devise to his children; and that he did not conceive when he had executed that will, that anything could be left to be claimed by his heir-at-law. Though the children were illegitimate, as I should infer from the will, and as we were informed on the argument, they were evidently the object of his bounty in preference to any collateral relation.

The first point in the question is, whether the executor, Mr. Kirby, took only an estate for life; and in my opinion that was all his interest under the will, though the testator, I believe, meant otherwise.

There is nothing here on which we could rely for the larger construction. The introductory words in the will "touching my *worldly estate*, I give and dispose of the same &c.," would not of themselves suffice to make the devise to Mr. Kirby in the end of the will, a devise in fee, in the absence of any words of inheritance; and besides, in this case, before any argument could be drawn from them as shewing that the deviser meant to devise all his estate, leaving nothing to go by descent, we must determine whether the residuary devise would not cover the reversion of this land, supposing the fee not to pass to Mr. Kirby; for if it does, then there is no room for the argument that he must have intended the fee to go to Mr. Kirby, because he meant to leave nothing undisposed of.

Then upon that second point, I am of opinion that the reversion which the testator must be held by us not to have disposed of, for want of words of inheritance or of anything to supply them, may well pass to the residuary devisees, the testator's five children, under the words "all other property of which I shall die possessed, and not herein mentioned."

Owning the whole estate in the lot No. 9 when he made his will, and at the time of his death, and having disposed by his will only of a life estate, he died possessed of his remaining interest in it, and that was "*a property*" not therein before mentioned, though it is true that the lot itself had been mentioned in the will by name. It comes, I think, within the principle of *Rooke v. Rooke*, 2 Vernon, 461.

See 3 P. W. 63; 1 Lev. 212; Saund. 180; 3 Mod. 229; 3 Atk. 492; 4 B. C. C. 337.

JUDGMENTS DELIVERED ON MONDAY, THE 30TH JULY, TRINITY TERM, 1849.

Present.—THE HON. J. B. ROBINSON, C. J.
THE HON. MR. JUSTICE MACAULAY.
THE HON. MR. JUSTICE DRAPER.

THE HON. MR. JUSTICE SULLIVAN absent from illness.
THE HON. MR. JUSTICE McLEAN in the Practice Court.

DOE DEM. RADENHURST V. McLEAN.

Tenant not receiving possession from landlord, putting him to proof of title.

Semble: that A., in possession of land to which he pretends no claim, taking a lease from B., who represents himself as the owner—is not estopped in an action of ejectment from putting B. to proof of title.

Ejectment for north half 29, 3rd concession, Vaughan.

The plaintiff was nonsuited; no one present to confess lease, entry, &c.

Motion to set aside nonsuit, because the cause was taken out of its turn, or on affidavits of merits.

The cause was not so called on as to afford any ground for excepting to the trial as irregular, or for any complaint of unfair practice on the other side.

It appeared on the affidavits, that the defendant had some time before gone upon land to which he had no claim or pretence of claim. While he was so occupying it a person (Mr. Leys), who had purchased the land from one whom he understood to be the grantee of the crown, went to him and demanded of him to go out of possession, unless he chose to acknowledge his (Mr. Leys) title and take a lease from him.

The defendant did take a lease from him, knowing that he had himself no right to the place, and believing that Mr. Leys had; as, for all that appears, Mr. Leys also himself sincerely believed. After this, Mr. Leys sold it to the lessor of the plaintiff; and since this assignment it has been discovered that the person who sold it to Mr. Leys had in fact no title, and that the land belonged still to the crown.

The defendant relied on *Cornish v. Searell*, 8 B. & C. 471; *Rogers v. Pitcher*, 6 Taunt. 202; and *Gravenor v. Woodhouse*, 1 Bing. 38; for shewing that, as the defendant in this case did not receive possession from the lessor of the plaintiff, or from Leys, but was already in possession before he took a lease from Leys, he was therefore not precluded from disputing the title of the lessor of the plaintiff.

ROBINSON, C. J.,—Whether under the circumstances, as I have stated them, the defendant could properly have been allowed at the trial to put the lessor of the plaintiff to proof of his title, is the question. If it be quite clear that he could not have been, then there would be no reason why we should not allow the nonsuit to stand, which would enable the lessor of the plaintiff to obtain his judgment against the casual ejector.

My present impression is, that after what had occurred, the defendant ought not to be allowed to put the lessor of the plaintiff to prove his title, although he did not receive possession from him, the ground on which the cases referred

to proceeded being, as I think, distinguished from the present. But my brothers are not clearly of that opinion, but incline to think otherwise.

We therefore set aside the nonsuit on payment of costs; and it will certainly be more satisfactory that the precise circumstances under which the defendant took his lease should be proved upon a trial.

Per Cur.—Rule absolute on payment of costs.

GRIGGS V. MEYERS.

Attorney.

Where the defendant, an attorney, settled with the plaintiff after a *fi. fa.* had been put in the sheriff's hands, which the defendant must have known the plaintiff's attorney had issued almost wholly for the recovery of his costs—*The Court* ordered the amount of the plaintiff's attorney's costs, included in the execution, to be referred to the master to be taxed, and the defendant to pay the same to the plaintiff's attorney, together with the costs of the application.

A case referred to this court from the Practice Court.

James G. Fitzgibbon, Esquire, an attorney of this court, brought an action for this plaintiff against the defendant, for malicious prosecution, on which a verdict was given for 2*l.* 10*s.* Judgment was entered, and on the 11th November, 1848, the plaintiff's attorney took out a *fi. fa.*, directed to the sheriff of Newcastle, indorsed to levy 63*l.* 5*s.* 4*d.*, besides fees of writ, postage, &c.; and the plaintiff's attorney complained, that after repeated promises to pay him the amount, the defendant paid the plaintiff in the suit in person the amount, or settled with him for it, and obtained a discharge from him on the *fi. fa.*, although he knew that the greater part of the money was coming to the plaintiff's attorney, and was for disbursements made by him to witnesses, and otherwise in the cause.

He moved now that the sheriff should be directed to amend his return on the writ of *fi. fa.*, and to proceed on said writ, or that another or *alias fi. fa.* should be issued in this cause to levy all except the verdict (2*l.* 10*s.*) notwithstanding the plaintiff's discharge to the sheriff; or that an order be made on the defendant peremptorily to pay to the plaintiff's attorney the amount of the said judgment (less the verdict), on grounds disclosed in affidavits, with such

directions as to costs of this application, and by whom they shall be paid, as to the court might seem just.

The *fi. fa.* issued 11th November, 1848, returnable the last day of Michaelmas Term, and the sheriff returned upon it, that he had caused the goods and chattels of the defendant to be seized, "and that before he could make the money the plaintiff discharged the same, therefore he could not have the money."

ROBINSON, C. J., delivered the judgment of the court.

The affidavit of Mr. Meyers does not by any means satisfactorily exonerate him from the charge made, of intending to hinder the plaintiff's attorney from recovering his costs by paying the amount of the execution, which he must have known was almost wholly for costs, to the plaintiff in person. That was a proceeding very much out of the common course, as the defendant, being himself an attorney must have well known. Mr. Meyers' account of the matter is in several respects inconsistent, and it tends to confirm the imputation on the other side, that he acted as he did with the express intention of intervening between the plaintiff and his attorney, to the prejudice of the latter; for he gives as one reason that actuated him, that the plaintiff stated to him his apprehension, that if the money got into his attorney's hands, he, the plaintiff, would not receive what was coming to him; and he intimates further his dissatisfaction with the part which he imagined the plaintiff's attorney to have taken in the suit.

But he had no right to espouse the side of the plaintiff in any difference which he might have or expect to have with his own attorney, and should not have presumed that all that the plaintiff chose to tell him was correct, without referring to the attorney, especially after the conversations which he admits he himself had with the attorney; neither should he have allowed the motive to enter his mind, of settling with the plaintiff to the prejudice of the attorney, because he believed the attorney had not acted handsomely by him (Mr. Meyers). Any feeling of that kind, whether well or ill founded, should have made him more scrupulous not to depart from the ordinary and proper course.

It is plain from the affidavits, that Mr. Meyers knew he was taking an unusual course, and that he did so deliberately without affording the plaintiff's attorney the opportunity to protect himself, and without referring to him (as he had ample time to do) to obtain his sanction to an arrangement which he must have known he had no right to enter into without such sanction.

Upon the affidavits, we think we are bound to direct that it be referred to the master to ascertain (of course upon notice to be given to Mr. Meyers) what sum is coming to Mr. Fitzgibbon, the plaintiff's attorney, out of the money which was directed to be levied upon the execution, either for costs taxed or disbursements made by Mr. Fitzgibbon in the cause, or for moneys due by his client, and which he might have been entitled to retain out of the moneys payable under this execution if they had passed through his hands; and that the defendant in this cause, upon such account being settled and ascertained, shall upon notice thereof pay such sum to the plaintiff's attorney, together with the costs of this application, and of the proceedings in chambers.

Mr. Meyers, being an attorney, we take this course, as being more convenient and summary than the directing of a new *fi. fa.* to issue, which course, has sometimes in similar cases been adopted in England.

WHITELAW V. DAVIDSON.

An irregularity in the award of venire upon the record, is amendable by the court.

In this case a rule nisi was obtained for a venire de novo, upon the ground of an irregularity in the venire—the venire awarded being returnable in vacation, and on a day before the record was passed: but *the court* held the irregularity amendable and discharged the rule.

FISHER V. FERRIS.

Where a plaintiff contracts to receive for work done, *at its completion*, a certain sum of money—and then agrees to accept from the defendant the promissory note of A. B., for the sum—he may sue for the money. If the note be not tendered *at the time specified*, a subsequent tender of the note and refusal, will be no defence to such an action.

Covenant, on an agreement to build a house according to certain specifications, and to receive in payment therefor

from defendant, the sum of 162*l.*; one-half when the roof should be put on the said building, and the other half when the building should be finished—the last sum to be paid by a certain promissory note for the sum of 75*l.*, drawn by one Thirkell. The declaration then averred performance by the plaintiff, part performance on the part of the defendant by the payment of the first half of the money, and then added—"that although the plaintiffs were ready and willing to accept of and from the defendant on account of the other half, the said note of Thirkell, yet the defendant did not, nor would when the building was completed, or at any time before or since, pay to the plaintiffs the said other half of the said sum of 162*l.*: to wit, the sum of 81*l.*, or any part thereof, although," &c.

Plea: As to the 75*l.*, residue of the sum of 81*l.*, that after the making of the said contract, and before the commencement of this suit, the defendant tendered the said promissory note to the plaintiffs, in full satisfaction, &c., and that plaintiff refused to receive the same, contrary to the said contract, &c.

Demurrer: That the plea was no legal answer to the declaration.

An exception was taken on the argument to the breach in the declaration, which the court overruled.

McDonald, Q. C., for the demurrer *Burrowes*, contra.

The cases cited were—8 E. R. 170; 2 M. & W. 223.

ROBINSON, C. J., delivered the judgment of the court.

The plea demurred to, is in our opinion, insufficient. It undertakes to answer 75*l.*, part of the demand being the amount for which the plaintiff had, by his own admission, agreed to receive payment in Thirkell's note, but it does not amount to a bar against the recovery of that money, for it only amounts to this—that at some time between the making of the contract and bringing the action, perhaps some months after the note should have been furnished, the defendant tendered it to the plaintiff, who refused it. The plea ought to have shewn that the note was tendered on the day when the payment was appointed to be made, in other words, when the building was finished, and that the

defendant has always since been, and still is ready and willing to deliver the note.

He relies on the mere fact that he did at one time offer the note, as being sufficient to bar all further remedy for the demand.—1 Saund. 33 (c.) note 2; 8 E. R. 171, Hume v. Peploc.

The declaration has been excepted to, but we see nothing amiss in it, nothing I mean that we could hold fatally wrong on general demurrer.

If it be true, as the plaintiff avers, that the defendant failed in delivering at the proper time Thirkell's note, which it was agreed should be received in part payment of the second 81*l.*, then the plaintiff could legally demand payment in money on his contract; and as to the plaintiff having laid as the breach that the defendant did not pay the 81*l.*, but failed to do so according to his covenant, it is sufficiently clear what is meant by that, for the plaintiff had just before averred that he was always willing to receive the note, and the complaint is that the defendant did not pay the 81*l.* as he agreed to do, that is, partly in money and partly in the note; and at any rate the defendant's plea would make any want of form in this respect of no moment

Per Cur.—Judgment for the plaintiff on demurrer.

HOBSON v. THE W. D. M. FIRE INS. CO.

Fire Insurance.—construction of Act—effect of mere change of occupation on the policy—what an alienation."

Semble.—That a mere change in the occupation of a house insured against fire, without notice, &c., there being no other alteration in the manner or purpose of occupation, will not avoid a policy of insurance effected under the provisions of the Act 6 Wm. IV. ch. 18, incorporating the Wellington District Insurance Company. *Semble also*—that a demise of the house insured for one year, is not "an alienation" within the act.

Action on a policy of Insurance against Fire.

4th Plea.—Setting out a bye-law, requiring—as it was assumed—that where there was a *change of occupation*, the policy should be approved of by the company; and then averring that the plaintiff, though the occupier at the time of effecting the insurance, was not the occupier at the time of the fire, but that A. B. was, and that such fact was not,

communicated to the directors, contrary to the bye-law, wherefore the policy became void.

5th plea.—That plaintiff, contrary to the statute and the policy, after, &c., alienated the house, &c., by demising the same for one year to A. B.

Demurrer to 4th plea.—Because it is not averred that the plaintiff had notice of the bye-law, or that the non-observance of the said bye-law would forfeit the policy.

Demurrer to 5th plea.—Because a demise of property is not an alienation within the statute.

Freeman, of Hamilton, for the demurrer. *Wilson*, contra.

The case was wholly argued upon the construction to be placed upon the several clauses of the Act of Incorporation, 6 Wm. IV., ch. 18, secs. 13, 17, 19 & 20.

ROBINSON, C. J., delivered the judgment of the court.

The defendant in this case desired to urge as an exception to the declaration, that it did not shew the policy to be signed by the president and countersigned by the secretary, as required by the 17th clause, but they had given no notice of such an exception, and therefore were not entitled to urge it. If in truth there was any thing wanting in this respect, necessary to the validity of the policy, the defendants have a plea of *non est factum* on the record.

The demurrer is to the defendants' 4th and 5th pleas.

The 4th plea is, in our opinion, insufficient. Knowing no more of the bye-law than is set out in the plea, we do not feel entitled to say that it certainly requires more than the 20th clause of the statute renders necessary, which clearly refers to the purpose for which the building is occupied, and not to any mere change in the occupant.

It is true that in one part of the alleged bye-law, which is not properly set out, (1 B. & P. 98) change of occupants is mentioned, of which notice is to be given; but taking into view all that is stated of the bye-law, I do not think it reasonable to hold that a mere change of occupant, without other alteration in the manner or purpose of occupation, is that kind of change to which the provisions of the bye-law as they are stated are to be applied, for it would seem absurd to suppose that the company are to have a right to make an

arbitrary increase of the premium upon the mere change in the person of the occupant; and if that were intended, the language of the bye-law does not plainly carry out that intention. I do not consider that the bye-law can be taken to have been passed for any other purpose, than to carry properly and conveniently into effect the enactment contained in the 20th clause of the statute; but at any rate the plea does not shew that the bye-law makes the policy void.

We are called upon to pronounce that to be the legal consequence of the bye-law not being complied with. We are not of opinion that such a consequence can be held to follow, in the absence of any provision to that effect in the bye-law itself.

It may have been, for all we can tell, the whole object of the corporation in passing this law, to afford to the assured a convenient and certain means of guarding himself against all defences being set up on the ground of increased risk, by alterations in the use made of the building, by stating the intended alteration, paying any increased premium that might be demanded, and obtaining a certificate of allowance which would of course be conclusive upon the company so far as regarded any objection on that head.

As to the 5th plea—the 13th, 17th and 19th clauses of the Act of Incorporation, 6 Wm. IV. ch. 18, as well as the reason of the thing, convince me that although a lease for a term, however short, is in one sense an alienation, yet that it is not an alienation within the spirit and intention of the 19th clause.

The legislature mean that upon alienation by "sale or otherwise," i. e. by gift, exchange, devise, &c., so that the insured ceases to be the owner, his policy shall be void, but his grantee or alienee may have it confirmed to him on his alienation. The 13th and 17th clauses shew what is meant.

The 6th plea cannot be good if the fourth is not, for it shews no circumstances from which we can see an increase of risk, and therefore can only rest the defence upon the mere change of occupation. It is, besides, double.

Per Cur.—Judgment for the plaintiff on demurrer.

SHUTTLEWORTH V. SHAW ET AL.

Pleadings—Covenant—Eviction—Apportionment of rent.

In an action of covenant, between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent, as in debt.

Declaration: covenant for rent.

Plea of eviction: demurrer.

The facts of this case are given in an application for a new trial, reported in volume 6th of the Jurist.

The only point that came up upon the demurrer was, whether, *in covenant*, an eviction *from part* of the demised premises was a bar to the action.

Wilson for the demurrer. *Crooks* contra.

The cases cited were—14 M. & W. 106; 2 E. R. 575; 1 Saund. 204, note 2; 1 M. & W. 747; 5 Moore, 558; 4 M. & G. 467.

ROBINSON, C. J., delivered the judgment of the court.

It is not easy to say whether this was intended to be a declaration in covenant, or in debt for rent on the demise: but as the express covenant to pay rent is set out, and performance averred of all covenants on the plaintiff's part, and as there is nothing in the declaration inconsistent with its being an action on the covenant, and general damages are laid in the conclusion, and not specifically as damages for detaining the debt, we think we should treat this as an action of covenant; especially as the defendants in the plea have answered the action as if it was on the covenant, and the plaintiff has joined issue on one of the pleas so pleaded.

Then taking the action to be covenant, as it is between the original parties to the deed and not between the lessor and an assignee of the lessee, the case of *Stevenson v. Lambard*, 2 E. R. 576, and the authorities referred to in it, shew the rent not to be apportionable in consequence of any eviction from part of the premises. The 2nd and 3rd pleas, therefore, if they are otherwise good, are not bad on the ground of their being but an answer to part of the cause of action, while they are pleaded in bar of the whole. That would be the case if the action were in debt, but it is not the case when the action is on the covenant.

If the pleas shewed the lessee had been evicted from a portion of the premises out of which the rent issued, then it seems that in this action of covenant they would be a good bar to the action. That at least is contended for; but we are of opinion that the pleas are insufficient and bad, they are the same pleas in substance and form, pleaded severally to each count.

It is repugnant and inconsistent to say, as it is said in them, that the road referred to as "*leading from and out of the said demised premises*" was part and parcel of the said demised premises. And if the defendants could not claim the road as part of the premises demised, which it could not be if it led *from and out of them*, then they could only claim the right to possess it under the other words used in the plea—"and used and enjoyed as such and appurtenant thereto." But, in the first place, it could be of no consequence that the road had been, either by the defendants or any other person, used and enjoyed as part of the demised premises, unless it was really included in the demise; so that the latter words cannot be relied upon alone and unconnected with the assertion, that it was parcel of the demised premises, which it could not be, consistent with the other assertion, that it leads from and out of them.

The defendants are in truth setting up an alleged eviction from an easement in another person's land, as a defence against the claim of rent issuing from the premises.

It would be a strange construction, which should hold that the convenience of passing over the land of a stranger (without its appearing under what circumstances it had been enjoyed) could pass under the terms "*appurtenances to the said premises belonging*," which must of course mean rightfully belonging.

We are all clearly of opinion that the plaintiff is entitled to judgment.

Per Cur.—Judgment for plaintiff on demurrer.

ASHFORD V. HACK.

A lessee assigns his interest; and the assignee of the assignee neglecting to pay rent and to keep the premises in repair, the lessee is sued by the lessor, who, upon being compelled to pay the rent and damages, sues the assignee of the assignee in a special action on the case for the damages he had sustained. *Held per Cur.*, that the lessee had a good right of action on the case against the assignee, for the rent and damages he had been obliged to pay the lessor.

Special action on the case by a lessee against an assignee of an assignee.

In this case the lessee of premises, which he had taken upon certain covenants, binding himself to pay rent and keep the premises in repair, sued the assignee of his assignee in a special action on the case, because certain rent accruing in the time of the defendant, and certain repairs requiring to be made also in the defendant's time, were not by him paid and performed; by reason of which the landlord had recovered certain arrears of rent and damages for not repairing, against the plaintiff, his lessee, who had in this action sought to recover the amount from the defendant, as for a default which the defendant incurred contrary to his duty, and by which the plaintiff had been damnified.

The defendant pleaded several pleas, which were demurred to and were abandoned on the argument.

Exceptions were taken to the declaration, on the argument, that the plaintiff had no right of action, because there was no privity of estate between plaintiff and defendant, nor any privity by contract.

Burns for the defendant. *Cameron, Q. C.*, for the plaintiff.

Cases cited on the argument—5 B. & C. 589; 9 Bing. 60; 1 Cr. & M. 644; 4 M. & W. 337; 10 M. & W. 109.

ROBINSON, C. J., delivered the judgment of the court.

The declaration in this case has been framed apparently on that in *Barrett v. Lynch*, 5 B. & C. 589, which fully supports this action, although in that case it was the first assignee who was sued, because the default happened to occur during his occupation. Here the default complained of was during the occupation of the second assignee, who is properly made defendant. His interest in the premises had expired with the term, and this plaintiff had no longer any connection with the property. There was therefore no

privity of estate between these parties, nor could any remedy by action of covenant lie by the one against the other. That is quite clear in the present case, which is therefore as free from any occasion for doubt, as the case of *Barnett v. Lynch* could be; and in *Barnett v. Lynch*, the judges all held that, even if under the circumstances a remedy might have been had in another form of action, as upon a contract, that would be no reason against the plaintiff's suing in a special action on the case; and Holroyd, J., expressly held, that even if the plaintiff could be shewn to have a clear action of covenant against the defendant under the lease, that would not prevent the plaintiff suing as for a tort.

Here the declaration, it is quite clear, shews at any rate no right of action in covenant by the lessee against Hack; and all that is said in *Barrett v. Lynch* in support of the action, founded as it was there on the plainest principles of justice, applies with at least equal force in the present case; for this defendant had not contracted with the plaintiff, who is suing him in tort, but took the place at second hand from Ramsay, through whom the plaintiff could derive no right of action. In this case, the plaintiff stands neither in the place of the lessor nor of his assignee, nor did he himself enter into any contract with the defendant, so that he could establish no action founded on contract. He would be absolutely without remedy at law, unless he could sustain this action; and it is fortunate that such a decision as that in *Barrett v. Lynch* has removed all difficulty.—See 9 Bing. 60; 1 Cr. & M. 644; Selwy. N. P. 1443; 2 W. Bl. 1111; 1 Ves. & B. 8; 3 B. & B. 54; Wilmot's Opinions, 345.

Per Cur.—Judgment for plaintiff on demurrer.

WATSON V. GORREN ET AL.

Notice when required to be given to defendant of plaintiff's performance of his agreement.

Where by an agreement the plaintiff is to deliver, *not personally*, to the defendant, but on certain parts of a road, a certain quantity of timber, sufficient to build certain bridges, he must *notify* the defendant of the delivery, before he can bring an action.

Declaration: assumpsit on a special agreement to fur-

nish at certain points, on a certain road, the requisite timber to build certain bridges, there was an averment in the declaration that the plaintiff did furnish on the said road, at the respective places fixed for the building of the said bridges, a sufficient quantity of timber, &c. ; but there was no averment of *notice* of such delivery to the defendant.

Demurrer for want of notice.

Wilson for the demurrer. *Read contra.*

Cases cited on the argument, 1 Ch. Pl. 328 ; Con. Dig. Pl. C. 75 ; 15 M. & W. 277.

ROBINSON, C. J., delivered the judgment of the court.

The agreement is incorrectly framed, not being such as it is reasonable to suppose the parties could have ever intended ; but as it does in express terms bind the defendant to pay when the timber should merely be got out and delivered upon the ground, the whole price which he was to pay for getting out the timber and building the bridges, of course the defendant is legally bound to do what he has promised.

There is nothing wrong therefore in his not having averred that he had built the bridges, for he was not obliged to wait till he had done that before exacting payment for the timber, as the agreement shews.

But we consider the declaration bad in not averring notice to the defendant, which is one of the exceptions taken.

There was no time set for building the bridges, or preparing and delivering the timber ; nor does the agreement call for any specified quantity of timber ; the defendant therefore could not know what was the amount of the claim upon him, nor when the plaintiff was in a condition to claim until he had received notice. If the plaintiff had bound himself to deliver to the defendant a certain quantity of timber on a certain day, then notice would have been unnecessary, because the delivery *to the defendant* which must have been averred, would have necessarily been a notice in itself.

But the agreement did not call for a personal delivery, and the declaration does not aver more than that the plaintiff delivered on the road at the place for building the bridges, as much timber as was necessary, and then without averring

notice to the defendant of the delivery of the timber and of the quantity, he brings this action because the defendant did not pay him a certain price per foot. The means of knowledge were in this case wholly with the plaintiff, and he should have averred notice.—2 Saunders, 62; Com. Dig. Plead. C. 75.

Per Cur.—Judgment for the defendant on demurrer.

JENKINS ET AL. V. MACKENZIE ET AL.

The effect of a prior endorser of a note being made executor by the holder.

A. makes a note payable to B. or order. B. endorses to C., who endorses to D. D., the holder, dies, leaving B. one of his executors. The executors of D. sue C. *Held per Cur.*, that D. having made B. his executor, B. was discharged from the debt, and that there was no remedy against the subsequent endorser.

Semble: that though under the authority of 4 T. R. 470, where a plaintiff suing in his own name is liable over to the defendant, by reason of a prior endorsement, he cannot recover; yet if he sues with others, not in his own name, but as an executor, he may.

In this case the defendant, James McKenzie, made a promissory note payable to Joseph Pierson or order, which Pierson endorsed; and after him, John James McKenzie, the other defendant, endorsed to Edward Proby, who has since died, leaving Jeanette Jenkins executrix, and Oliver, Pierson and Fergusson, executors of his will.

The plaintiff, Pierson, who was thus made executor, was the same Pierson who was payee and first indorser of the note; and the defendant, John James McKenzie, pleaded that "Pierson, to whom or to whose order the note was made payable, and who indorsed to him the said defendant, was the same Pierson who was one of the plaintiffs, and who was liable to him, the defendant (John James McKenzie), as such endorser, in case the said defendant should be obliged to pay the same. This was the substance of the plea, which was demurred to.

Read for the demurrer. McKenzie, of Kingston, contra.

Cases cited—15 M. & W. 208; 9 B. & C. 130; 4 Scott, N. R. 287; 1 B. & P. 120; Co. Litt. 264 (b. note 209); 3 Bro. P. C. 179; 8 Vin. Ab. 607; 4 M. & S. 232; Chitty on Bills, 538; 3 Esp. C. 46; 3 Campb. 281; 2 B. & P. 62; 2 Showers, 394; Pothier on Obl. 1 vol. 397, &c.; Bayley on Bill, 275.

ROBINSON, C. J., delivered the judgment of the court.

This plea follows closely that in *Wilders and others v. Stevens*, 15 M. & W. 208. It points only to the defence, that one of the plaintiffs is liable over to the defendant on the note, and is on that account disabled from recovering, as was held in *Bishop v. Haward*, 4 T. R. 470; and no doubt that must be the effect of the position in which the parties stand in relation to each other on the bill, if the effect is not varied by the circumstances that Pierson is not suing on his own account, but as executor of Proby, and not suing alone, but with others.

The case of *Bishop v. Hayward*, 4 T. R. 470, decides in effect that no action would lie in this case, by Pierson suing in his own right against McKenzie, if McKenzie had indorsed the note back to him. But here the executors of Proby, who was the holder, are suing McKenzie as second endorser, and there is no such reason why Proby should not have recovered, nor consequently why his executors should not; for by that means the executors recover the debt for the estate, as they should do, and they keep it. The defendant has no right of action to force the money back from the estate, and therefore the principle of *Bishop v. Hayward* does not apply. Let the defendant recover back from Pierson if he can, but there can be no reason in that why Proby's estate should not be paid.

The plea does not take the exception, that Pierson is discharged by being made executor by Proby. It would seem to be quite clear, that if Pierson were the maker the debt would be discharged, for it would as to the creditors be regarded as assets in his hands, as executor, and so there could be no remedy against this indorser.

We cannot hold the effect to be different, because Pierson, instead of being maker of the note, is an indorser, but prior to this defendant's indorsement. The effect is the same as if Pierson had paid the debt to the executors, or had been released without payment, after which there could be no remedy against any subsequent indorser.

As we see this to be the state of facts on the record, we must give judgment on demurrer for the defendant; for the

objection is of that nature, that it goes to the very right of action and cannot be overlooked by us.—4 Scott's N. R. 287; 3 Esp. c. 46; 2 B. & P. 62; 9 B. & C. 130; 4 M. & Ry. 22; Co. Litt. 264 (b) note 209; 1 Wil. 46; 2 Bl. Rep. 1236; 4 T. R. 825; 2 Showers, 481; Story Pro. Notes, see 423.

Per Cur.—Judgment for the defendants on demurrer.

DOUGALL V. EXECUTORS OF CLINE.

Attornies—Power of the court to prevent attornies pleading unjustly the Statute of Limitations to actions for monies received for clients—Statute of Limitations.

The following answer of an attorney to his client when demanding payment of monies left for collection—"that the debt had not been paid, that the defendant had no property, and that he (the attorney,) could not help the debt being unpaid"—not containing an express promise to pay, or admissions from which a promise could be implied—*Held per Cur.*, not sufficient to take the case out of the Statute of Limitations, though it was subsequently proved that at the time of such answer the attorney had collected his client's debt.

Semble: that the court has authority to prevent an attorney pleading the Statute of Limitations to defeat a client's just claim, but that this power does not extend to his executors.

Appeal from the District Court of the Eastern District.

The plaintiff in 1837, had a debt due to him by J. Crysler, and employed the testator (R. Cline), an attorney, to collect it. Judgment was confessed: and 9th March, 1837, a *fi. fa.* was issued to levy the money—indorsed to levy 26*l.* 10*s.* 2*d.*, of which 19*l.* 14*s.* 6*d.* was for the debt, the remainder for costs. About the same time the plaintiff being indebted to one McMillan, gave him an order on Mr. Cline, the attorney, to pay him the debt when he should collect it of Crysler, which order he wrote on the back of a receipt which the attorney had given him for the note against Crysler, which had been left for collection. The attorney accepted this order.

McMillan called repeatedly on the attorney with this order, and was told that the debt had not been paid, that Crysler had no property, and that he, the attorney, could not help the debt being unpaid. The last time he called was about 1847, two years before the action brought. At last he left the order with J. S. McDonald, Esquire, another attorney, to collect if he could without a suit, and took his receipt for it, and afterwards settled otherwise with Dougall for the debt coming to him, so that he had no longer any

interest in the accepted order, which by McMillan's direction was given up by J. S. McDonald, Esquire, to Mr. Cline's clerk.

It was sworn upon the trial, by J. S. McDonald, Esquire, that he also had called with the order on Cline, in order to obtain payment for McMillan, when Mr. Cline told him that he had not collected the money. This must have been about two years ago. The truth was that Mr. Crysler had paid 22*l.* 10*s.* to Mr. Cline, the plaintiff's attorney, in 1837, for which receipts were produced on the trial; and, indeed, when Mr. Cline's docket was referred to, it contained entries of those payments, but no entry of his ever having paid any money over to the plaintiff, nor was any attempt made to prove that he had.

This, after deducting costs, left a sum of 15*l.* 4*s.* 3*d.* justly due to the plaintiff, exclusive of interest.

Mr. Cline died in 1847; and the plaintiff in May 1848, brought his action against the executors of Cline, in the District Court, to recover the money which had been collected for him.

The executors pleaded the Statute of Limitations—*actio non accrevit infra sex annos*—on which the plaintiff joined issue.

At the trial, the defendants contended that the action was barred by the statute, which began to run when Crysler paid the money.

2ndly. That Cline having accepted an order in favor of McMillan, for the money, when it should be collected, he was no longer accountable to the plaintiff.

The judge below reserved leave to move for a nonsuit, and granted a rule nisi in term, which he afterwards discharged, giving leave to enter judgment for the 15*l.* 11*s.* 3*d.* only, not conceiving that the plaintiff could legally claim interest on money had and received.

This judgment was appealed from.

J. Lukin Robinson for the appeal. *P. M. Vankoughnet*, contra.

The cases cited were—Doug*l.* 654; 3 P. W. 143; 2 B. & C. 149; 2 Q. B. R. 770; 3 B. & Al. 288; 2 Mod. 213; 2

Saund. 127, note a. d.; 6 T. R. 182; 6 Vez. 580; 1 R. & M. 255; 1 Taunt. 571; 5 Dowl. 717; 6 Dowl. 304; 1 Jurist, 405; 3 B. & Ald. 626; 3 Br. & Bing. 373; 14 M. & W. 741; 12 M. & W. 159.

ROBINSON, C. J., delivered the judgment of the court.

We are not surprised that the judge of the District Court should have made an effort to sustain a recovery in this case, when it would seem so repugnant to justice that the Statute of Limitations should be suffered to defeat the claim; but we cannot but hold that the ground is not tenable on which the verdict was upheld. The evidence seems irresistible, that the testator did receive the money. Mr. Cryslar, who paid it, swore to the fact and produced the testator's receipts, whose own attorney's docket also contained an entry of the payment, made by Cryslar, and no entry of the payment over.

We cannot believe that, under these circumstances, the defendant will withhold the money, unless there is some explanation to be given which we do not yet see. One's mind revolts at the apparent injustice of one person being employed to collect money for another, and telling him for years, in answer to repeated inquiries, that he has been unable to collect it; and then, when at last the client discovers that it has been in fact collected, and demands it, that the attorney should be able to say, "I received the money more than six years ago, notwithstanding what I told you: your claim is therefore barred, and I will never pay it."

We do not believe that if the attorney were living he would have pursued that course. If he had, it is clear that the court, through their control over their own officers, would have prevented such injustice. The case of *Ex-parte Sharpe*, 5 Dowl. 717, is an authority on that point.

We should be sorry to think that what the court could have compelled, if the testator were now living, will not now be voluntarily done, unless indeed some just cause can be shewn why it should not. We cannot deal summarily with the executors.

In strictness, we think the statute began to run from the

time of the payment, and that, notwithstanding the fact that an order was outstanding in favor of McMillan for a long part of the time, which might have disabled Dougall from suing himself.

It is quite true, as the learned judge observed, that when the testator declared he had not collected the money, that was plainly acknowledging that he had not paid it over; and thence he inferred that he might, without a forced construction on his words, treat him as saying within the six years—"I have never received it; when I do receive it, I will pay you." But when we consider that, according to the spirit in which the statute has long been acted upon, if the testator had said "I got the money ten years ago, and I have not paid it over and never will," the plaintiff would have been barred, I think we could hardly hold the plaintiff to be in a better situation, when the other party positively denied the receipt and made no promise whatever.

We come reluctantly to the conclusion that we must reverse the judgment below, and direct a nonsuit to be entered; but we think we have no alternative. The case is before us on a mere legal question reserved at the trial. If the case could have been taken out of the statute, by setting up fraud by the attorney, there is no doubt that there should have been a plea to meet it; but I do not say that the facts would have supported that defence.—2 Mod. 113; 1 Russ. & M. 255.

Per Cur.—Judgment below reversed.

HOULDITCH V. CORBETT.

As a general rule, the sheriff is bound by his return to a writ of *fi. fa.* but not in all cases; he would not be bound by it, for instance, where a verdict has passed against him on such return and shewn it incorrect.

Case for false return of *fi. fa.* at the suit of this plaintiff, against one John Grundy.

The first count charged that there were goods sufficient to satisfy the sum directed to be levied, viz., 137*l.* 13*s.* 2*d.* of which the defendant had notice, but that the defendant neglected to levy.

The second count charged that the defendant did seize

goods of Grundy sufficient to satisfy the debt, but would not levy the debt thereout, and falsely returned *nulla bona*.

Pleas—to first count, that there were no goods of J. Grundy; of which the defendant had notice.

Second—to the second count, that the defendant did not seize any goods of Grundy under the writ. The jury found a verdict for the plaintiff 8*l.* 17*s.* 6*d.*

Smith, Q. C., of Kingston, obtained a rule for a new trial on the law and evidence. *McDonald*, Q. C., of Kingston, shewed cause.

The cases cited were—2 U. C. R. 164; 2 C. & P. 355; 7 M. & W. 288; 11 M. & W. 267; 1 C. & P. 154.

ROBINSON, C. J., delivered the judgment of the court.

We think this verdict is so much against the weight of evidence, that it is proper to grant a new trial on the condition of paying costs. There is no complaint of misdirection nor any legal question, except indeed, that raised by the plaintiff's counsel, and on which he endeavoured to support the verdict, namely, that the sheriff cannot now controvert the return made by him on Prentiss's execution, and that therefore all the goods which he had seized and sold on that writ must be considered as legally applicable to its discharge, although in fact, he has had a verdict pass against him for 246*l.*, in an action brought against him by this very plaintiff, on the ground that some of the goods seized belonged to the plaintiff, and not to Grundy.

This left Prentiss's execution in part unsatisfied, and as it was prior to the plaintiff's writ, the sheriff was of course justified in applying so much of the money made on the subsequent sale, as was required to satisfy that writ, and indeed bound to do so.

This left no surplus applicable to the plaintiff's writ, unless the plaintiff can be allowed to say at one moment that the cattle for which he recovered in an action against the sheriff, were wrongfully seized, and so entitle himself to a verdict for their value against the sheriff, and to contend the next moment that the cattle were Grundy's, and so that he is entitled to have the proceeds of sale applied to his execution after satisfying Prentiss's execution, which is in effect

insisting on receiving the value of the cattle twice. The law is not so unjust. The sheriff is bound by his return, as a general rule, but not when he has been taught his mistake, as in this case, by the verdict of a jury.

Per Cur.—New trial granted on payment of costs.

MCCLELLAN AND WIFE V. MEGGOTT ET AL.

Issue of non-tenuit in an action of dower—what evidence under.

Semble: that where the evidence shews that the plaintiffs, in an action of dower, could have assigned dower, which would be binding upon themselves, they are entitled to succeed upon the issue of non-tenuerunt, without any reference to the comparative goodness of their title.

Mary McClellan sued in this action as the widow of John Potruff, deceased, for her dower in certain lands in Binbrook.

The defendants pleaded with other pleas non-tenuerunt in the common form of such plea, i. e. "that they the *said tenants* are not, nor is either of them, nor at the time of the commencement of this suit, or at any time since have they or either of them been tenants thereof, or of any part thereof, as of freehold, &c."

John Potruff, sen., was seized of the premises in question, in fee, being the south half of lot 6, in the 1st concession of block 5 in Binbrook, and on the 2nd of March, 1809, he made his will, devising his lands among his children, but using no words of inheritance. Simon Potruff, one of his sons, assuming that he had an estate in fee in part of the lands, aliened in fee to one Aitkin, who died having devised the premises to these defendants upon certain trusts.

The defendant claimed dower in that land as being the widow of John Potruff, jun., heir of his father John Potruff, Simon being dead. Aitkin had entered and was possessed when he died, and his devisees entered upon his death and were in possession, claiming the fee.

The jury found on the issue of non-tenuerunt for the defendants—on the other issue for the plaintiffs.

S. Jarvis obtained a rule for a new trial on the law and evidence; and for misdirection and rejection of proper evidence, and of affidavits. *Freeman*, of Hamilton, shewed cause.

Authorities cited—Fitz. N. P. 148, A.; 3 Lev. 331; Co. Litt. 35, A; Roper, Husband and Wife, 389.

Ro BINSON, C. J., delivered the judgment of the court.

There is no doubt that they are tenants for the purposes of this action, without reference to the comparative goodness of their title. They could have assigned dower which would have been binding at least upon themselves, and the issue on the plea of non-tenuerunt should have been found for them.

Per Cur.—Rule absolute.

BANK OF BRITISH NORTH AMERICA v. SHERWOOD.

Variance between deed pleaded and produced—collateral security.

Where the defendant set up a deed as made between A. B. of the one part, and The Bank of British North America of the other, and when produced at the trial, it turned out to be a deed made between A. B. and Mr. Thomas Paton, who was afterwards stated in the body of the instrument to be the inspector of the bank.

Held Per Cur. that the variance was fatal, and could not be amended.

Held also, that the deed as set out in the pleadings in this case, and given below, shewed clearly an intention on the part of the bank to take it as *collateral security*, and act as an assignment in satisfaction of the notes.

The plaintiff declared on a promissory note made by D. Bethune on the 24th of May, 1848, to D. J. Smith or order, for 200*l.*, at three months, indorsed by payee to this defendant and by him to the plaintiff.

Also on another promissory note of D. Bethune, made the 30th of May, 1848, to same payee or order, at three months, for 200*l.*, indorsed in like manner by the defendant to the plaintiff.

The defendant pleaded, first denying Smith's indorsement and his own; also denying notice of non-payment.

In another plea (the 8th) the defendant pleaded that by agreement between the plaintiffs and Bethune without consent of this defendant, time was given to the maker Bethune, viz., one month, and that in pursuance of such agreement, Bethune did on the 28th of July, 1848, by indenture assign certain shares in a steamboat to the plaintiffs, with a proviso to be void if he should pay the notes *within one month after they should fall due*, and that Bethune gave and the plaintiffs received the indenture so given for and

on account of the said notes and all money to become due thereon, without the consent of the defendant.

In another plea (the 9th) the defendant pleaded that on the 28th July, 1848, Bethune made and delivered to the plaintiff, a certain deed by which he covenanted to pay the plaintiffs the sum of money in the notes mentioned, *at a certain time in the said indenture mentioned*; and that the plaintiffs accepted and received the said indenture from Bethune in full satisfaction and discharge of the said promissory notes, and of all monies to become due for or in respect of the same.

In another plea (the 10th) the defendant pleaded, that on the 20th July, 1848, Bethune made and delivered to the plaintiffs his certain deed or indenture, whereby he did amongst others things, grant, bargain, sell, assign and convey to the plaintiffs forty-two shares of a certain steamboat, called, &c., and that the plaintiffs then and there accepted the same shares in full satisfaction and discharge of the said promissory notes, and of all monies to become payable thereon.

The plaintiffs replied to the 8th plea *de injuria*.

To the 9th, that Bethune did not make and execute the indenture, nor did the plaintiffs receive the same in satisfaction and discharge of the promissory notes.

To the 10th, that the shares in the steamer were not given or received in satisfaction and discharge of the notes.

On the trial of these issues, when the indenture intended to be pleaded was produced, it turned out to be an indenture not between the plaintiffs and Mr. Bethune, as pleaded, but between one Thomas Paton, said to be the inspector or chief officer in America of the British North American Bank, acting on their behalf.

It was objected that this was a fatal variance. The Chief Justice considered that it was, and declined giving leave to amend, the defendant's attorney having been many days before apprised of the fact in regard to the deed, and having omitted to make any application to amend, though it was suggested to him by the opposite party that he should do so.

The jury were told that the plaintiffs were entitled to their verdict, and that it must be left to the defendant to apply to the court in banc for a new trial, with liberty to amend the pleadings, which application would probably be granted or refused as might appear just under all the circumstances, for that it might then be shewn in the affidavits filed on both sides, whether the indenture in question was really intended between the parties to have the effect of cancelling the notes, or merely as additional and collateral security.

The jury found for the plaintiffs 418*l.* 9*s.* 7*d.*

The deed which was relied upon as relieving the defendant from his liability upon his notes, was an indenture made the 28th of July, 1848, between Mr. Bethune (the maker of the notes) of the one part, and Thomas Paton, of the city of Montreal, in the district of Montreal, Esquire, of the other part. It commenced by reciting the ownership by Mr. Bethune of $\frac{42}{64}$ parts of the steam vessel referred to, that "he was indebted to the Branch of the Bank of British North America, in Toronto, in 3000*l.*, or thereabouts, upon divers bills of exchange and promissory notes, some of which had matured and others were not yet due; and that he requested the said Thomas Paton, the inspector of the said bank, to give him time for payment of the same, and of all future liabilities to the said bank, upon the security of the aforesaid $\frac{42}{64}$ parts or shares of the steamer, which the said Thomas Paton had agreed to do."

"And then the deed witnessed that Mr. Bethune thereby assigned and transferred unto the said Thomas Paton, his executors, administrators, &c., all the said claims, &c., to hold the same unto the said Thomas Paton, his executors, administrators and assigns, to the only proper use, benefit, and behoof of the said Thomas Paton, his executors, administrators and assigns forever, subject to this proviso for redemption, viz., that if the said D. Bethune should pay to the said branch of the Bank of British North America in Toronto, or their assigns, *all such* sum or sums of money as were then or should at any time or times thereafter become due, or owing from the said D. Bethune to the said bank,

in Toronto, *whether upon bills of exchange, promissory notes, cheques, or otherwise, however, then the said indenture should be absolutely void ; but that in case of default in paying all such sums of money as then were or thereafter might become due, as aforesaid, then it should be lawful for the said Thomas Paton, his executors, &c., to make sale of the said shares by public auction or private sale, and out of the proceeds of such sale, to retain to and for the use of the said bank, the principal monies and interest thereby intended to be secured, which should be due and owing to the said bank, and all costs and expenses, &c., and to pay over the residue to the said D. Bethune.*

“ Mr. Bethune then covenanted with the said Thomas Paton, his executors, &c., that he would well and truly pay to the Branch Bank, &c., all sum and sums of money secured or intended to be secured by these presents, in the manner hereinbefore mentioned, adding covenants for title, for quiet enjoyment by the said Thomas Paton, his executors, &c., at all times after default *should have been made in payment of the sum or sums of money hereby secured or intended so to be, and for further assurance, to the said Thomas Paton, his executors, &c.*

“ And it was stipulated in conclusion, that until default should be made by the said D. Bethune in payment of the said *sum or sums of money* thereinbefore mentioned, or *some part thereof*, it should be lawful for the said D. Bethune to retain possession of the said shares, &c.”

The deed was executed by Mr. Bethune only.

By our provincial statute 7 Wm. IV., ch. 34, sec. 1, it is enacted that all actions on behalf of the B. N. A. Bank may be brought in the name of any of the local directors or of the managers of the company in the province.

Sherwood, Q. C., obtained a rule for a new trial, on the ground of misdirection and for the rejection of legal evidence. *A. Wilson* shewed cause.

The case cited on the argument were—3 M. & Gr. 213, 258, 780 ; 4. Q. B. R. 182 ; 2 Bing. N. C. 693 ; 2 Car. & Kir. 372 ; 4 M. & Gr. 68 ; 4 C. & P. 22 ; 9 C. & P. 786 ;

3 B. & C. 208; 8 T. R. 168; 4 M. & S. 470; 1 Campb. 70; 4 T. R. 616; 1 B. & B. 442; 2 Mod. 217; Dyer 277.

ROBINSON, C. J., delivered the judgment of the court.

We think this case is too plain to admit of doubt. In the first place, as to the *objection* that the deed produced did not support the pleas, it is clear that it did not. The defendant set up a deed as made by Mr. Bethune of the one part, and the Bank of British North America on the other,—whereas when produced, it turned out to be a deed made between Mr. Bethune and a Mr. Thomas Paton who was afterwards stated in the body of the instrument to be inspector of the bank.

The case of *Ankerstein v. Clark*, 4 T. R. 616, may seem at first to give some support to this way of stating the instrument; but the distinction between the cases is plain: there the bond was made to the husband and wife, and was declared upon as if made to the husband alone. The court held it was not a fatal variance, for that the husband was entitled to sue alone on the bond. We must consider, however that the statement in that case was true as far as it went, for the bond was made to the husband. It was only like the common case of suing one of several makers of a promissory note, not noticing the others, which the courts have always held is no variance on a plea of *non fecit*, because it is true that the person sued did make the note, and the non-joinder of the other makers can only be taken advantage of by pleading in abatement.

But in the case before us, the stating the deed to be made between Mr. Bethune and the B. N. A. Bank, is matter of description, and it must at least be accurate so far as it goes. The case of *Hoar v. Mill*, 4 M. & Sel. 472, is a very strong authority on that point. If this were not a fatal variance, then every deed made to a trustee might be pleaded as if made to the *cestui qui trust*, which would certainly not be according to its legal effect.

But independently of this objection, the effect of the deed is not truly set out. It does not support the 8th plea, which avers that it contained a proviso that Bethune should pay

the notes "*within one month after they should fall due,*" but the deed contains nothing of the kind.

Then the 9th plea avers, that by the deed Bethune covenanted to pay the several sums of money mentioned in the notes, *at a certain time in the said indenture mentioned*; but the indenture appoints no time for paying the monies to fall due on the notes, but expressly leaves the money to be paid according to the terms of the notes themselves.

Then upon the 10th plea, the defendant also clearly failed, for the issue on that plea made it necessary to shew such an assignment given and received as is pleaded in that plea, which certainly was not shewn, but an assignment to a different party, though to the use of the plaintiffs, in a qualified sense, that is, to hold as a security and not as property conveyed in satisfaction and discharge of the debt.

Upon the latter point in the case, there can be nothing more clear than that the deed was a mere collateral security, and not an assignment in satisfaction.

The plain object of it was not to interfere with any of the outstanding securities, but to leave them to be paid at maturity, according to their tenor. There is an expression in the recital about an intention to give time, but it is clear that no time is given in fact, nor was intended to be given, and that the deed was a mere collateral security to back the notes and bills, which were to be kept alive. It can be nothing else, for it mentions no certain sum, and expressly leaves the securities in force and payable, according to their terms.

The deed is not quite consistent in itself, for it speaks as if there were some sums already due, and yet says, if default *shall be made in paying any of the sums*, Mr. Paton may sell the shares, when, in fact, there was already a default, so that the power of sale under the deed attached at once. The two notes sued on in this action were neither of them yet due, but the deed left Mr. Bethune and all other parties clearly liable upon them, according to their terms, &c. So far from giving time, the object clearly was, to let Mr. Paton come in at any moment when circumstances

might make it advisable, and take possession of the shares in the boat; for the instrument shewed that there was a default incurred at the moment of its execution.

It is impossible to conceive a clearer case of security being merely collateral, and not intended to interfere with the execution of the original contract.

Per Cur.—Rule discharged.

THE QUEEN V. JARVIS, SHERIFF, IN THE CASE OF
ROSS V. COXALL ET AL.

Sheriff's liability for not returning a writ of fi. fa. till ruled to do so.

The court will not fix a sheriff with the debt merely because he has not returned a writ of *fi. fa.* until after he has been ruled to do so. The plaintiff in execution will be left to his remedy by action against the sheriff.

Quære—Can a judge in chambers pass judgment upon a sheriff for contempt, under our statute 7 Vic. ch. 33, after the object of the statute has been attained, viz., the return of the writ of *fi. fa.*?

On the 25th of November, 1848, a *fi. fa.* against goods was placed in the sheriff's hands, in *Ross v. Coxall et al.*, returnable 1st Hilary, 1849, and Severs, a bailiff, was sent by the sheriff to execute it; and on going to seize certain goods, supposed to be theirs, one James Coxall came and claimed them as his property; notice of this claim was given to the plaintiff's attorney, Mr. Holland, and a bond of indemnity was asked for.

Mr. Holland agreed to furnish such bond, and therefore, with his assent, *nulla bona* was returned to the *fi. fa.*; and an *alias fi. fa.* was issued and given to the sheriff 10th February, 1849, returnable last of Hilary, indorsed to levy 70*l.* 6*s.* 10*d.* with interest on 68*l.* 0*s.* 10*d.* from 23rd November preceding, with sheriff's fees.

In consequence of no sufficient bond of indemnity being given before the writ was returnable (as the sheriff says he is informed and believes), Severs did not act upon the writ before its return. When a bond was furnished, it was so shortly before the return that Severs informed Mr. Holland it was impossible for him to act on that writ, and requested that a new writ might be taken out, on which any goods of the defendants might be immediately seized. Mr. Holland declined doing this, and ruled the sheriff to return the writ.

The sheriff having made no return when the rule expired,

an attachment issued against him, and subsequently a *habeas corpus*, under which he was brought by the coroner before Mr. Justice Macaulay, in chambers, and was allowed to give bail to answer interrogatories. He was examined before the master, and the above is the substance of his answers; and he added that the two defendants, S. & T. Coxall, had not, nor had either of them, to his knowledge, during the currency of either of the writs of *fi. fa.*, any goods or chattels other than those claimed by James Coxall, for selling which the plaintiff's attorney undertook to indemnify him, the sheriff, and that he had not seized any goods under either of the said writs.

These answers were made by the sheriff 20th April, 1849, and were corroborated by an affidavit of the bailiff Severs, who swore that it was on the last day of Hilary term that Mr. Holland produced a sufficient bond of indemnity; that he could not then go to execute the writ, as the defendant's residence was ten miles off; and being the last day of term, he had other things which he was bound to attend to, and that he pressed Mr. Holland to take out a new writ, and it should be executed the next week.

These interrogatories and answers being referred to the master for his report, on 28th April, he reported the sheriff in contempt for not having returned the writ as directed by the rule; but he added, in his report, "the said sheriff *now returns* the said writ of *alias fieri facias*, and the same is of record upon the files of this court."

Upon this report of the master, the sheriff was brought before the Chief Justice, in chambers, on a notice which he directed to be given to him; and the plaintiff's attorney pressed for judgment upon the contempt, evidently contemplating that the sheriff would not be relieved except on terms of satisfying the execution.

But, 1st, the Chief Justice hesitated on the point whether our statute 7 Vic. ch. 33, contemplated that a single judge sitting in chambers out of court should pass judgment upon the sheriff for a contempt, after that which appears to be the object of the statute had been attained, namely, the enforcing the return of the writ; and as there had been no instance

yet of a formal judgment for the contempt being passed in vacation, he thought it better to forbear taking that final step, till the effect of the statute in this respect, had been considered by all the judges.

2ndly. It did not appear to him, that he ought at any rate to fix the sheriff with the debt under the facts of this case.

He, therefore, on the 11th of May, 1849, made an order, that on the sheriff's paying the costs of the rule to return the writ, and all subsequent costs incurred thereon, to the plaintiff's attorney, he should be allowed to enter into recognizance to appear in court on the first day of next term (Easter), to receive the judgment of the court for his contempt, and that upon giving such recognizance he should be discharged from the custody of the coroner (the writ of *fi. fa.* having been returned.)

Hagarty accordingly moved for judgment.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff's attorney (Mr. Holland) made an affidavit stating a case which appears to shew great and vexatious neglect and impropriety of conduct on the part of the deputy sheriff and the bailiff in acting upon the *fi. fa.* and *alias*, and although nothing wrong is imputed to the sheriff in the matter, it has been pressed upon us, that as the plaintiff in the cause has probably lost the means of collecting his debt, in consequence of the goods which had been seized having been disposed of in the meantime, we should not relieve the sheriff from custody upon this attachment on any other condition than his paying the debt and costs.

There are, no doubt, many instances of that course being taken, where the sheriff has failed to bring in the body after returning *cepi. corpus*, because there, when the sheriff has let the defendant out of custody without taking a bail bond, the plaintiff has lost the security for the recovery of his debt, and his action has been rendered fruitless. But no instance has been shewn us of the sheriff being fixed with the debt, merely because he did not return a writ of *fi. fa.* until after he had been ruled to do so.

The object of the rule is to compel a return, by which the sheriff knows he must abide, and upon which the plaintiff in

the suit has his remedy, if it be false. In this case the goods seized were either the goods of the debtor, or they were not. If they were not, and if the debtor had no other goods, then the return is true, and no other injury has been done to the plaintiff by the sheriff's delay than the trouble and costs of compelling the return of the writ. If, on the other hand, the goods which had been seized (as it is asserted) were the goods of the debtor, or if he had other goods, of which the sheriff had notice, then the plaintiff has the remedy which all other suitors have, by an action against the sheriff upon the return, which we must assume to be a perfectly adequate remedy. We can administer justice upon no other principle. We cannot try upon affidavit the question of property in the goods seized, or take upon ourselves to determine summarily, whether the defendant had or had not such amount of goods liable to seizure as would have satisfied the writ, (2 Dowl. 86.) Upon the same principle on which we should fix the sheriff with this debt of 70*l.* for not promptly making his return upon a writ of *fi. fa.*, we should in a similar case fix him with a debt of 700*l.*, if the writ had been indorsed for that amount.

The injury of delay cannot be supposed in such a case to be equivalent to the loss of the debt: there is no necessary proportion or connection between the one and the other. It depends upon what was actually done, and what could have been done under the writ; in other words, on there being goods to satisfy it. If it were right to take mere delay, however vexatious, irrespective of that consideration, to be a ground for fixing the sheriff with the debt, then we should see that consequence following in practice, whenever the sheriff neglected returning the writ till he had been compelled to do so. If we must have regard to the consideration of what the plaintiff has suffered by the delay (and it is unjust to act on any other principle), then we must leave the fact to be established in the proper manner, by an action. The plaintiff's counsel has not been able to furnish us with a single instance of such a course being taken as is pressed upon us in this case.

It is intimated that from some cause the remedy by action

cannot be looked to as likely to afford redress, whatever verdict might be obtained on it.

We cannot assume that, but are bound to assume the contrary. The statute law of the province, as regards security to suitors against misconduct or default of sheriffs, is such, that we cannot reasonably entertain a surmise that a party cannot obtain satisfaction for any such default which he can establish.

If he does not, it must be because either the suitor himself is wanting in diligence, or because the provisions of the act are neglected in some particular which does not rest with this court.

The immediate object of this attachment has been obtained—the sheriff has returned the writ; and we see no other course proper for us to take, where no intentional wrong is imputed to the sheriff, than to direct, as we now do, that he be discharged, on paying any such further costs as the plaintiff has been put to on the attachment since the order was made in chambers.

Per Cur.—Sheriff discharged on payment of costs.

CHURCH QUI TAM V. RICHARDS.

Billiard Tables—Duty imposed on by Town of London, under Act of Incorporation—Provincial duty—Recovery of Penalty—in what form of action—Sufficiency of averments in declaration.

Held per Cur.—That a by-law of the corporation of London, passed under the authority of the statute 10 & 11 Vic. ch. 48, and providing “that every owner of a billiard table, shall pay 10*l.* per annum for a license to keep the same,” had not the effect of abrogating the duty imposed on billiard tables by the provincial act 50 Geo. III. chap. 6, but must be considered as a regulation superadded for the purposes of the town of London.

Held also—That an action of debt would lie for the penalty, on the statute 50 Geo. III. chap. 6.

Held also—That in an action for the penalty, it need not be averred that the defendant had not paid the penalty. *Also*—That it need not be averred in the declaration, that the defendant kept the table without having first obtained a license from the inspector of licenses—that he did so without having first obtained a license, is sufficient. *Also*—That it need not be averred that the offence was committed after the 29th September, 1810.

Semble—That the statutes 3 Vic. ch. 9, sec. 9, and 3 Vic. chap. 20, do not apply to any person merely setting up and keeping a billiard table for hire, not being at the same time a keeper of an inn or a house of public entertainment.

The plaintiff sued in debt for a penalty, under the stat. 50 Geo. III. ch. 6; and declared, that the defendant here-

tofore, viz., on 12th June, 1848, at &c., had in his possession, custody and power a billiard table set up and kept by him for hire and gain, without having first obtained a license to keep the same, against the form of the statute, &c., whereby and by force of the statute, &c., the defendant had forfeited for his said offence the sum of 100*l.*, and an action had accrued to the plaintiff, who sued as aforesaid, to demand from the defendant for himself and the Queen 100*l.*

The defendant pleaded *nil debet* "by stat."

Verdict for plaintiff, 100*l.*

Becher, of London, obtained a rule for a new trial for misdirection, the reception of improper evidence, and on the law and evidence. *J. Duggan* shewed cause. The authorities cited were—50 Geo. III. chap. 6, sec. 2; 3 Vic. chap. 9; 10 & 11 Vic. chap. 48, secs. 1, 26; Hob. 198; 2 Saund. 131; 6 Taunt. 140; 4 U. C. R. 365; 1 Saund, 309, note 5.

The several objections urged in banc will be found taken up one by one as they arose, in the following judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

The statute 50 Geo. III. ch. 6, imposes a charge or duty of 40*l.* yearly upon every person having in his possession, custody or power any billiard table set up for hire or gain, without having first obtained a license for that purpose from the Inspector-General of the Province; for which license he is to pay a duty of 40*l.*

The statute then enacts that if any person shall, after the 29th May, 1810, have in his possession, custody or power any billiard table, set up for hire or gain, directly or indirectly, without having first obtained such license, such person shall forfeit and pay the sum of 100*l.*, to be recovered by action of debt, bill plaint, or information in his Majesty's Court of King's Bench in this province.

The duty imposed is appointed by the act to be paid to the Receiver-General of the province, and towards the support of the civil government thereof. And the statute directs that one moiety of the forfeitures and penalties that may be incurred under its provisions, shall be paid to the Receiver-

General, for the use of his majesty, "*and the other moiety to the person who shall pay for the same.*"

By the 3rd Vic., ch. 9, sec. 9, it is declared to be necessary to afford greater facilities for the conviction of persons having or keeping a billiard table without taking a license, and it is enacted, "that every keeper of an inn, alehouse, ordinary or recess, and every other person who shall keep a house of entertainment, resort or boarding, who shall have or keep a billiard table in such house, out-house or room or building connected with or attached thereto, and for the keeping or having of which billiard table a license shall not have been obtained, according to the provisions of 50 Geo. III., ch. 6, shall, upon complaint made by the inspector of the district, or any other person, to any justice of the peace, be liable to be convicted, upon such complaint, by two or more justices, *who may award execution thereon*, according to the provisions of the before recited act; any law to the contrary notwithstanding. And it is further provided, that in case, after conviction, the penalty cannot be recovered for want of property, either of the justices convicting may commit the offender to the gaol for one month, unless the fine and costs shall be sooner paid.

By stat. 3 Vic. ch. 20, sec. 10, it is recited, that the payment of the duty imposed on billiard tables by the 50 Geo. III. had been evaded; and it is enacted, that every keeper of an inn or house of entertainment, who shall have and keep a billiard table in such house or building attached thereto, shall be subject as by the said act is directed.

By the statute 10 & 11 Vic. ch. 48, which forms the present charter of the Town of London, it is provided, in the 25th clause, among the other matters over which control is given to the mayor and town council; that they may pass by-laws for regulating or suppressing *all public billiard tables*; and further, that they may impose a duty on *all ball alleys or other means of gambling within the said Town*.

Under this general authority the town council of London made a by-law, 27th January, 1848, providing that every owner or keeper of a billiard table should pay 10*l.* per annum for a license to keep the same, and under this law

a license was granted, on the 30th March, 1848, to one William Hatelie to keep and use the billiard table in question in his house in the court house square, for one year from 1st March, 1848.

It was contended at the trial, that this was all the license now required by law, for that the duty imposed by the corporation took the place of that imposed by 50 Geo. III., ch. 6; but it is clear, in our opinion, that the provincial duty still continues, and that this license, required by the corporation to be taken out under the by-law, is merely a regulation superadded for the purposes of the town, which has not the effect of abrogating the other.

We consider also, that the action of debt for the penalty clearly lies on the statute 50 Geo. III., ch. 6, the act giving one-half of the penalty to her Majesty, and the other half to the person *who shall sue for the same*, and providing, in the third clause, that an action of debt may be brought for it.

The evidence shewed clearly that the offence was committed in the district of London; and the record shewed that the action was instituted in time.

As to the objection, that it is not averred that the defendant had not paid the penalty, the case of *Baldwin qui tam v. Henderson* in this court, (4 U. C. R. 365,) is in point against the defendant. And we think that the declaration, charging the offence as it does in the words of the statute cannot be held to be insufficient after verdict.

It might have been more formal, to have averred that the defendant kept the table without having first obtained a license *from the inspector of licenses*; but the allegation, that the defendant kept the table without having first obtained a license contrary to the form of the statute, is sufficiently certain.

It is not a fatal exception, we think, that the declaration does not expressly state that the offence was committed after the 29th Sept. 1810.—1 Saund. 305, note 5. And we see no defect in the declaration, for which we should arrest the judgment. Although general in its mode of charging the offence, it follows the words of the statute, and has not been demurred to.

As to the competency of Hatellie to be a witness, we see no ground for questioning it. We have no right to assume that he has transgressed the law, and if he has, the recovery against this defendant cannot exempt him from answering for it.

But then we have to consider how the later provincial statutes which have been referred to affect this matter. I mean the 3 Vic. ch. 9, sec. 9, and 3 Vic. ch. 20. It is rather strange that two such statutes should have passed in the same year; and they certainly are not carefully framed.

The provisions in those acts seem to be directed only against any keeper of an inn or house of public entertainment or resort, who shall have or keep in his house an unlicensed billiard table. They do not seem to apply to any person merely setting up and keeping the billiard table for hire, not being at the same time a keeper of an inn or house of public entertainment, and this seems, on the evidence, to have been the situation in which this defendant stood.

If the 3 Vic. ch. 9, sec. 9, took in the case of this defendant, then the consequence would be, that he would be liable to be convicted in the same penalty of 100*l.*, (though the statute is ill drawn and obscure in that respect) by a much more summary mode of proceeding. Whether such provision for summary prosecution would be cumulative merely, or would be taken to supersede the proceeding by action in this court, given by the 50 Geo. III. ch. 6, would then be a question, which, however, we need not now consider.—2 Burr. 1040; 3 T. R. 442; 5 T. R. 542.

As to the argument, that the defendant did not mean to offend against the law, and that he supposed that the stat. 50 Geo. III. was in force within the town of London, the defendant must be left to urge that in other quarters. We can only deal in this action with the legal questions, and we see no ground on which we can pronounce the verdict to be against law.

Per Cur.—Rule discharged.

GAS COMPANY V. RUSSELL.—DAVIS.—O'NEILL ET AL.—
BLUE.—KISSOCK.—NICOLLS.

Gas Company of Toronto—Liability of Stockholders, in an action of debt, under 11 Vic. ch. 14, to pay calls made by the secretary of the company in pursuance merely of a resolution adopted by the directors before the passing of the act.

The Gas Company in Toronto sued stockholders A. B. C. D. in separate actions of debt, *founded upon the statute 11 Vic. ch. 14.* This statute related to such action only as might be brought for the recovery of money, which “should from time to time be called for by the *Directors* of the said company (that is, of the company incorporated by the statute), *under and by virtue of the powers and directions of that act.*” It was proved in evidence at the trial, that the *secretary* of the company, acting under a *resolution* merely of the directors, passed *before* the statute 11 Vic. ch. 14, came into force, notified the stockholders that a call of 10 per cent. would be made on the 1st May, June, July, and August. *Held per Cur.*, that as upon this evidence these calls could not be said to be “made by the *directors* of the company, acting *under and by virtue of the power and directions of that act*, the company could not sustain their action upon the statute.

Semble—That it is not a resolution of the directors to make a *call* upon the stockholders, which constitutes the *call*—but the notice or advertisement of the call itself.

Semble—That where an act says, “that no instalment shall be called for except *after* the lapse of one calendar month from the time when the last instalment was called for,” calls made for 1st May, June, July, and August, would be illegally made.

Quære also, whether the four calls could regularly be made at *one* time.

TORONTO GAS COMPANY V. RUSSELL.

Appeal from the District Court of the Home District.

The action in this case was debt.

Pleas: *nunquam indebitatus*.

2. That the defendant was not, nor is, a holder of the shares, or any of them, in the manner and form alleged.

The claim was for 10*l.* 6*s.*, for *five* calls on two shares, “each call *not exceeding* 2*l.* 10*s.* on each share.”

It appeared in evidence, that five calls were made; that the first call was made on the 29th of October, 1847, of five per cent., on subscription; that on the 29th of March, 1848, it was resolved that the following instalments be called in, viz.:—

“ 10 per cent.	on the 1st of May,
10	“ “ 1st of June,
10	“ “ 1st of July,
10	“ “ 1st of August,

and that the secretary, upon receipt of official authority, be instructed to notify the stockholders of the above in the city papers, as provided for in the bye-law.

(Signed) “JOHN WATSON, *Manager.*”

That on the 23rd March, 1848, the act passed : that there was no general meeting of shareholders afterwards before this action was brought ; that on the 28th of March, 1848, the following notice was inserted (dated 15th March) in these words:—

NOTICE.

The Consumers' Gas Company of Toronto, incorporated by act of Parliament.

Notice is hereby given, that instalments on the capital stock of the Consumers' Gas Company of Toronto have been called in, payable as follows:—10 per cent. on the 1st of May, 1848; 10 per cent. on the 1st of June, 1848; 10 per cent. on the 1st of July, 1848; 10 per cent. on the 1st of August, 1848. These instalments are required to be paid to the secretary, at the office of the Company, west wing of the New City Hall Buildings, first floor up stairs, as they respectively fall due.

By order of the Board of Directors.

(Signed) JOHN WATSON, *Secretary.*

Office of the Consumers' Gas Company of Toronto,

March 25th, 1848.

That this notice was inserted, in pursuance of the resolution of the 22nd March, and on no other authority ; that there was no reference to the directors on the subject of the calls between the 22nd and the 28th of March ; that no meeting took place after the act passed till 29th March—the secretary, Mr. Watson, swearing, “ I drew up the advertisement, and published it, in consequence of the resolutions of 22nd March, without any further reference to the directors.”

That on the 12th of July, 1848, it was ordered, that all parties who had not paid the first instalment be written to ; that their accounts will be handed over to the company's solicitors, if not paid on or before Thursday, the 20th instant.

That on the 27th of September 1848, it was ordered, that for the present, further instalments on stock shall not be advertised for ; but that the president and manager shall use their discretion in suing defaulters on amounts of 10% and under.

Upon this evidence, the following objections were taken by the defendant at the trial:—

1st. That no subscriptions were binding, because the subscription was made on condition, and there was no proof of condition being performed.

2nd. That there was one calendar month between each call.

3rd. That no evidence was given of bye-laws made for the calls.

4th. That no bye-law had passed after the passing of the act.

5th. That there had been no general meeting of the shareholders to sanction the call.

6th. That calls made before the act, were not under its authority, and so there was no right to sue under the act for such calls.

7th. That four calls made at one time was illegal.

8th. That no place was named in the advertisement, or rather, though a place was named in it, yet it being drawn up without reference to the directors, no place was legally appointed.

When Watson was called he was objected to as an incompetent witness, because he had subscribed for shares in the original subscribers' list; but he swore that he never did in fact hold any shares, and was not allowed to do so, as the company had appointed him there secretary or manager; he had not transferred his shares—had never paid any instalments; that no bye-law or resolution of the directors had been made, annulling his subscription or relieving him from it. He was received as a witness.

A verdict being found for the plaintiff's, 10*l.* 8*s.* 6*d.*, a nonsuit was moved for in the court below, pursuant to leave reserved on the objections raised at the trial, or for new trial on the law and evidence, and for the reception of improper evidence.

The judge of the District Court made absolute the rule *nisi* for a nonsuit,

1st. Because the calls being made on the 22nd of March, and the act not having passed till the 23rd, they were not made under the act, and so could not be enforced.

2nd. Because there was not a month's interval between each of the calls.

This decision was appealed from.

GAS COMPANY v. DAVIS.

Tried also in the Home District Court.

Debt, for 10*l.* 5*s.* 6*d.* Declaration precisely like that in Russell's case.

Watson proved that the four last calls were unpaid.

There was the same verdict as in Russell's case, 10*l.* 8*s.* 6*d.*

The objections taken at the trial were—

1st. That the subscription was conditional, and that there was no proof of condition fulfilled.

2nd. That the calls were not made according to law—the lapse of a month between each not having intervened.

3rd. That no evidence of bye-laws was given.

Leave was reserved to move for nonsuit, and a nonsuit was moved for, or a new trial on the law and evidence.

The *rule nisi* was made absolute for a nonsuit, on the same grounds as in Russell's case.

No objection was taken in this case to the witness Watson as interested.

GAS COMPANY v. O'NEIL ET AL.

Debt, claiming 38*l.* 8*s.* 9*d.*, for three calls, not exceeding 2*l.* 10*s.* each on the shares held by the defendants.

Same pleas as in Russell's case.

The evidence in Gas Company v. Kissonock, tried before the Chief Justice in Toronto, was agreed to be read in this case. The defendants paid the five per cent., and the ten per cent. instalment, for 1st May, 1848, and promised to pay the rest.

It was also admitted, that the defendants and others, on 10th February, 1849, filed a bill in Chancery against the plaintiffs, praying injunction to restrain this action.

GAS COMPANY v. BLUE.

In this case the plaintiff sued in debt, for 28*l.* 2*s.* 6*d.*, being for all the five calls on five shares held by the defendant.

Same pleas as in last case.

It was agreed that the evidence in Russell's case should be read in this.

GAS COMPANY V. KISSOCK.

This defendant had paid nothing, but had promised to pay since the calls were advertised, and some of them payable.

In this case the plaintiff's sued in *assumpsit*.

In these four cases, all the objections were taken that were taken in Russell's case.

The head of the subscription list in all these cases, ran thus:—"We, the subscribers, hereby agree to take the number of shares (of 10*l.* 10*s.* each, payable by instalments) opposite our respective names, in the proposed Gas-light Consumers' Company, *provided that a majority of the subscribers shall see fit to carry out the contemplated object.*"

GAS COMPANY V. NICOLLS.

The plaintiffs sued, setting out—that whereas the defendant, heretofore, viz: on the 10th day of November, 1848, was and for a long time after had been, and still is, the holders of divers, viz: 10 shares in the stock of the said company; and being such holder, then was and is indebted to the plaintiffs in 56*l.* 5*s.*, the same being the amount of divers, (viz: five) calls before then made, and payable in respect of each of the said shares of the defendant; by reason whereof the defendant became liable to pay to the plaintiffs the amount of the said calls, by force of the statute in that behalf, on request, and being so liable afterwards promised the said plaintiffs to pay the same; yet he has not paid the same or any part thereof, to the plaintiffs' damage of 100*l.*

The defendant demurred, objecting that the plaintiffs should have sued in debt.

Also, because it was not averred when the calls were made, and the facts were not set forth with certainty as to time, &c.

The following are the provisions of the act 11 Vic. c. 14, so far as they apply to the questions raised in these several cases.

It recites that a portion of the stock of the said company *had been subscribed for and the first instalment at the rate of six per centum paid.*

It then recites a meeting of the stockholders on the 29th October, 1847, at which directors were chosen. It then makes the shareholders present and future a corporation, and continues the directors already in office till 1849.

It authorises stock to be held in shares of 12*l.* 10*s.* each, and as much more if necessary.

The first general meeting of the stockholders to be in October, 1849, to choose directors, and so on same day in each year afterwards.

Sec. 8.—The directors shall have power to appoint officers, &c., to make and alter bye-laws, &c., *and also shall and may have the power to make calls on instalments on shares, subject to the provisions thereafter made."*

10th clause.—Former subscribers confirmed: and all stockholders *are hereby required to pay the sums of money by them respectively subscribed, or such part and portion thereof as shall from time to time, be called for by the directors of the said company under and by virtue of the powers and direction of this act, to such person or persons, and at such times and places as shall be directed or required by the directors.*

Then it provides that if any stockholders shall neglect or refuse to pay *the same* as required, the directors may cause the amount to be sued for. It then gives a short form of declaring, and adds that it shall be sufficient to prove the signature of the defendant to some book or paper as subscribing for shares, *and that the number of all calls in arrear have been made.*

11th clause.—No instalment shall exceed 2*l.* 10*s.* on each share, and notice thereof shall be given by advertisement in at least two of the Toronto newspapers during at least three weeks before such instalments shall be called for; and that no installment shall be called for, "except after the lapse of

one calendar month from the time when the last instalment was called for."

And if any person shall neglect to pay his share of such money to be so paid in, *at the time and place fixed and appointed by the directors*: such person so neglecting may be sued as aforesaid, or, at the option of the directors, shall incur a forfeiture of, &c., on the amount of his shares.

Hagarty and Hector for the appeal. *Burns, Eccles, Phillpotts, and Helliwell*, contra.

The authorities cited were—5 T. R. 130; Dougl. 10, 387; Cowper, 464; Salk. 23; 2 Lev. 252; 12 M. & W. 560; 9 M. & W. 450; 10 B. & C. 158; 3 Y. & C. 19; 16 M. & W. 811; 11 Jurist, 802; 2 Q. B. R. 281; 2 M. & Gr. 674; 11 Sim. 327; 2 B. & Ad. 518; 3 M. & W. 473; 6 M. & W. 49; 1 Greenl. Ev. 426; 8 C. & P. 480; 14 L. J. N. S. C. P. 237; 1 M. & W. 151; 9 B. & C. 577; 2 Price, 93; 3 M. & W. 473; 6 M. & W. 49; 14 M. & W. 504; 7 Dowl. 275; 4 B. & C. 962; 13 E. R. 231.

ROBINSON, C. J., delivered the judgment of the court.

The principal question to be considered in all these cases—except that against Nichols—is, whether the calls can be said to have been made by virtue of the *powers and directions* given in the statute.

The actions are professedly founded on the statute, and the declarations are in a form which could not be sustained otherwise, but the statute relates to such actions only as may be brought for the recovery of money which “shall from time to time be called for by the directors of the said company (that is, of the company incorporated by the statute) *“under and by virtue of the powers and directions of that act.”*

The objection on the part of the defendant in each case, is, that all the calls sued for were made before the act was passed, the first being made in October, 1847, and the other four on the 22nd of March, 1848, and the act was not

passed till the 23rd March, 1848; wherefore none of the moneys sued for can be said to have been called for under and by virtue of the powers and *directions of the act*.

It is contended on the other side, that this objection confounds the resolution to make the calls with the calls themselves, and that it is the advertisement or notice in each case which constitutes the call upon the stockholders to pay.

I quite agree in that, but then it is indispensable to the maintenance of the action to shew, that the notice or advertisement, which is relied upon as constituting the call, was given by the directors of the incorporated company, under and by virtue of the power and directions of the act. We think that was not shewn to be the case, or rather that it was shewn not to be the case; and we concur therefore in the opinion of the judge of the District Court in Russell's case, that there is a fatal objection to the action in that respect.

It is true, that on the 22nd March, when the directors of the Company not yet incorporated resolved to make the four calls, and appoint the periods of payment, they directed in the same resolution that the secretary, *upon receipt of official authority*, be instructed to notify the stockholders of the above in the city papers, as provided for in the bye-laws.

The words "*upon receipt of official authority*," are of uncertain meaning. They might mean, "upon receipt of official information of the passing of the act;" or "upon receipt of official authority from the board, after being duly constituted under the act, to publish notices in conformity to the resolution of the 22nd of March."

The latter is the more obvious meaning, and it contemplates exactly what ought to have been done. On the 22nd of March, the directors might have had good reason for contemplating in what shape the act which they had been applying for was likely to pass; but it was not yet a law, and in fact the amount of each share, and the manner in which the instalments upon it might be called in, was not fixed by any legal authority. The proper time for notice and form of the notice could not certainly be known by

them on the 22nd of March; they could have no authority on that day to give any notice under and by virtue of the act, which was not yet passed. It was therefore proper and necessary, as the directors seem to have felt when they were passing their resolution, that after they came into possession of their legislative charter, official authority should be given to the secretary to make such calls as they had described in their resolution of the 22nd March—that is, in case the act should be found to admit clearly of such calls as were then only proposed.

We consider (whether the directors meant that by the resolution or not), that they ought to have met, after receiving the statute, and confirmed or modified their resolution of the 22nd of March, and given a distinct instruction to make the calls accordingly. Instead of that, all that is shewn is, that Mr. Watson, who had acted up to that time as manager of the incorporated company, drew up and sent to several newspapers an advertisement for carrying out the resolution of the 22nd of March; and he did this, as he swore upon the trial, in consequence of the resolution of the 22nd March, without any further reference to the directors. He stated expressly, that that resolution or minute was his only authority for the advertisement—that he had no other.

There was indeed no meeting of the directors between the 22nd March and the 29th, when the first meeting took place after the passing of the act. The advertisements were issued on the 25th of March.

It is plain on this statement, that whether we should regard the resolution of the 22nd of March, or the advertisement, as constituting the call, it cannot possibly be said in either case that these calls were made by the directors under and by virtue of the powers and directions of the statute. On the contrary, it was the resolution of the 22nd of March, and nothing else, that operated all the way through; and it is plain that the judgment or discretion of the directors was never exercised in making a call under the authority of the statute. It is true that the minutes of such meeting were read, and as witness said, approved at the following meeting. Such is the common course, but we know that that

means nothing more than that the minutes are recognized as being a true record of what passed. The purpose of reading them is to see that what was done at the previous meeting is rightly related. No resolution upon them is taken in the second meeting, or is understood to be implied. I mean no act of the judgment of those present confirming or ratifying the previous resolutions. The directors, at their meeting on the 29th of March, merely heard read what had been ordered on the 22nd, before the act was passed.

Then it is shewn further, that on 12th July, the directors resolved that those who had not paid the first instalment (which was called in to be paid in December, 1847) should be written to, that their accounts would be handed over to the company's solicitor if they were not paid by the 20th July. That minute had no reference to any of the instalments but the first; and neither that, nor the minute proved to have been made on 27th September, 1848, could in our opinion be allowed by us to have the legal effect of making the calls for any of the five instalments, such calls as we can declare to have been made under the powers and directions of the act. For it is plain, first, that when those calls were resolved upon and ordered, the directors could not have had the authority of the statute, for it was not then passed; and therefore, that in appointing the amount, time, and manner of payment, they acted without such authority; and also plain, secondly, that the advertisement issued in consequence of that resolution was not a call made by the directors under the act, but a call made by the mere ministerial agency of a subordinate officer, acting independently of the statute, and under a previous authority, derived from those who were directors before the statute passed, and who gave him, before the statute was made, the only authority he ever had for publishing that advertisement.

The intention of that act surely was, that before any call should be made under its authority, the directors, acting under the new legislative charter, should exercise their discretion in applying the provisions made in it on the subject of calls. But it is plain that they did not do this, and had no opportunity of doing it; and it is important that they

should have had, for we find the defendant's maintaining that they only subscribed on certain conditions, which the statute did not conform to; and if it were known that any stockholder objected to advancing his money on that account, it was fit that the calling in of instalments should have been a deliberate act of the board as composed under the statute, and an act done after the statute had been passed and its provisions had become known.

Besides, the calls resolved upon on the 22nd of March, might or might not have been so made as to suit the arrangements made by the statute, and it was indispensable that there should be some sanction and adoption by the directors, after the act was passed, of arrangements actually made in ignorance of its provisions, but which could not be legal unless made under its authority.

The case of *North of England Railway Company v. Biddulph*, 7 M. & W. 342, does not remove the objection, and was rightly held by the judge of the District Court not to apply; for there the objection was, that the resolution for making the call did not specify the place where and the person to whom the money was to be paid, but these were all specified in the notice published on the same day. The court held the notice to be the call; and they said that as there was no objection taken at the trial, that the publication of the notice was not distinctly proved to have been the act of the directors, they would then assume it to have been their act, and on that ground they held the call sufficient, and refused a new trial. Baron Alderson expressly said "A notice given by the secretary, without the authority of the directors, would be bad altogether.

Now in the case before us, the proof is, that the notice, which to make it a legal call was required to be given by the directors, *under and by virtue of the statute*, was only given by the secretary in obedience to a resolution passed by them before the statute was made, and we cannot in our opinion treat such a notice as a call made under the power and directions of the statute.

The case cited by Mr. Hagarty in the argument, of *Sheffield Railway Company v. Woodcock*, 7 M. & W. 574, comes

also short of the facts of the present case, because there the notices really were "by order of the directors."

In this case the notice cannot, in the face of the evidence given, be considered to have been published by order of the directors of the incorporated company, but by an order made by persons who could not at that time have been acting under the statute; and if it depended upon that, there might be some difficulty in recognizing, as the act of the managers of the company, a notice published by a person not shewn to have been in any manner appointed since the act, to represent or act for the company. The 8th clause of the act contemplates, that all officers but the directors (whose authority was continued by the statute), should be appointed by the corporation under their new charter.

Whatever willingness the directors may have shewn in July, to enforce calls which they state to have been made in March, cannot affect the question, whether, for instance, on the 1st of May, 1848, a sum was due for a call legally made under and by virtue of the statute, payable on that day. If the debt was not then due, because the call had not been made under the statute, it cannot become due as for a call payable then, by reason of anything which the directors could do some months afterwards.—Mood. & Malk. 151. Nor can any promise to pay made by the defendant, effect the question of his liability, and of the legal right to sue him as for a call made under the statute.—3 B. & Ad. 527.

As this main question of the calls being legally made or not, affects the two cases tried in the District Court and appealed, and also the three which were taken down to trial at the assizes, it is not necessary that we should go into any of the other objections taken in them.

I will, however add, that I consider that the calls made for the 1st of June, July, and August, 1848, were not legally made, on the ground taken—namely, that they were not called for (by which I understand, made payable) after the lapse of a calendar month from the time when the last preceding instalment was made payable.

The shareholders had all of the 1st of May to pay the first of the four calls in; and there was not a calendar

month between the first of May and 1st of June—that is after the 1st May, it is not a calendar month to the 1st of June—a calendar month did not elapse “after the 1st of May before the 1st of June, when the next instalment was made payable, and so in respect to the subsequent instalments.”

I incline also to think, that as this act is expressed, the four calls could not regularly be made at one time, but should have been made from time to time, as the exigencies of the undertaking should appear to the directors to require.—2 B. & Ad. 518.

It is not necessary, however to determine that point.

LANE V. KINGSMILL.

Attachment for contempt in not paying moneys—Sheriff sued for an escape of party arrested on—Averments in declaration—Pleas, bail to the limits.

Where an action is for a tort and the damages in the discretion of the jury—*Semble* : that a promissory note may be taken in satisfaction ; the principle that a less sum of money cannot be taken in satisfaction for a greater, not applying in such a case.

Semble—that before the return of a writ of attachment for contempt, the sheriff cannot properly take bail for the appearance of the party, without the order of a judge ; but that after the return, if the party is in upon an attachment merely to compel the payment of money, the sheriff as of course may take bail to the limits.

To an action of escape against the sheriff, a plea that the prisoner escaped without the knowledge of the sheriff to places unknown to sheriff, and voluntarily and without knowledge of sheriff, returned into the custody of the sheriff, is insufficient ; the plea ought to aver that the sheriff did not know where the prisoner was during any period of his absence.

Semble—that if an attachment for contempt in not paying moneys is to be regarded as mesne process, it should be averred in the declaration for an escape, that the sheriff had not the party in court to answer the exigency of the writ. The averment merely that on the return day of the writ the sheriff allowed the party to go at large, will not do.

And if the attachment is to be regarded as an execution—*semble*, it then requires something in the nature of a judgment to support it. The merely averring that the plaintiff sued out an attachment for contempt without stating what the contempt consisted in, or by what authority it had been determined the party was guilty of contempt, is insufficient ; a good legal foundation for the attachment must be shewn on the record.

Declaration : case against the sheriff of the Niagara District, for an escape of A. B., in the custody of the sheriff under an attachment for contempt.

The first count merely set out a common cause of action from A. B. to plaintiff, as for a debt due, and that for the recovery of the same the plaintiff sued out an attachment for

contempt, against A. B., he being an attorney of the court, directed to the defendant as sheriff, &c., commanding him to attach, &c., A. B., and to have him before our justices at Toronto, on, &c., to answer us of and concerning such things as should be then and there objected against him. The indorsement on the attachment was then averred: and that the attachment was delivered to the defendant, who executed the same, and arrested A. B., and kept him in custody *till the defendant on the return day of the writ*, without the leave, &c., permitted A. B. to escape, whereby the debt was lost, &c.

The second count averred that one C. D. was indebted to the plaintiff, and that the plaintiff employed and retained the said A. B., as the attorney of him the plaintiff, to recover the said debt, he, the said A. B., being an attorney, &c., that A. B., as such attorney, sued C. D., and recovered and received from him the amount of plaintiff's claim; that A. B. refusing to pay to the plaintiff the money so received by him as such attorney, the plaintiff sued out an attachment against A. B. for the recovery of the same, directed to the defendant as sheriff, &c., and commanding him to have A. B. before, &c., to answer such things as should be then and there objected against him; that the said attachment, endorsed, &c., was delivered to the defendant, as such sheriff, &c., who arrested, &c. The escape was then set out, as in the first count.

Pleas.—6th plea: And for a further plea to said first count, the defendant says, that after the happening of the said escape, and the accruing of the said causes of action in said first count mentioned, and before the commencement of this suit, to wit, &c., the defendant delivered to the plaintiff a certain promissory note, made by one Walter Wilson, for the sum of 40*l.*, and dated on the day and year last aforesaid, and payable three months after the date thereof to Messieurs Kirkpatrick and Burrows, or order—the said Kirkpatrick and Burrows then being the attorneys and agents of the plaintiff in the matters and proceedings in the said count mentioned—in full satisfaction and discharge of the said causes of action in the said first count mentioned, and all damages in respect thereof; and which said

promissory note, so made, and payable as aforesaid, the plaintiff then accepted and received, in such full satisfaction and discharge, as aforesaid ; and this the defendant is ready to verify, &c.

7th plea : And for a further plea to the first count of the declaration, the defendant saith, that after the issuing and delivery of the said writ to the defendant, and after he had arrested the said A. B. thereon, as in said count alleged, and before the return thereof, he the defendant, according to the statute in the behalf, and as he lawfully might, took bail for the said A. B., well and truly remaining within, and not going or removing beyond or out of, the limits by law appointed to and for the goal of the said district of Niagara ; and did then and there permit and allow the said A. B. to have the benefit of said circuits, whilst so in custody under said writ. And the defendant further saith, that after the arrest of said A. B., aforesaid, he the said A. B. remained and continued in custody on said attachment ; and the defendant from thence and until and at the return day of said attachment, had the body of the said A. B. ready to be brought before the said justices, at Toronto, whenever he the defendant should be required so to do ; and he the said A. B., after the said return day of said attachment, and whilst he so had the benefit of such limits as aforesaid, to wit, &c., wrongfully, privily and without the knowledge or consent of the defendant, escaped from and out of the custody of the defendant, and beyond the said limits, to places by the defendant unknown : but the defendant further says, that the said A. B., before the defendant had any notice of said escape, and before the commencement of this suit, to wit, on the day and year last aforesaid, and voluntarily and of his own accord returned back again into the custody of the defendant, on such writ, within such limits as aforesaid ; and that he the defendant did thereupon then and there keep and detain him the said A. B. in his custody upon said limits, upon said attachment in said count mentioned, and did always from thence continually keep and detain the said A. B. in his custody on such attachment in such limits, until the said A. B., whilst

in such custody, afterwards and before the commencement of this suit, to wit, &c., died ; and which said escape, in this plea mentioned, is the same escape whereof the plaintiff hath above in said first count complained against the defendant ; and this the defendant is ready to verify, &c.

8th plea : And for a further plea to said first count, the defendant saith, that after the delivery of said writ to the defendant, and before the return thereof, to wit, &c., he took and arrested the said A. B. by his body upon the said writ, and had and detained him in custody thereupon, ready to be brought before the said justices, at Toronto, according, to the exigency of said writ, when he the defendant should be thereunto required ; and that after the said arrest and return day of said writ, and before the commencement of this suit, to wit, &c., he the said A. B., with force and arms, wrongfully, privily, and without the knowledge and against the will of the defendant, broke and escaped from the custody of the defendant, as such sheriff, to places to him the defendant unknown : but the defendant in fact further saith, that the said A. B., afterwards and before the commencement of this suit, to wit, &c., voluntarily and of his own accord returned back again into the custody of the defendant upon said writ, and that he the defendant did thereupon then and there keep and detain him the said A. B. continually in custody of the defendant on said attachment, ready to be brought before the said justices when thereunto required, until the said A. B. whilst in such custody and before the commencement of this suit, to wit, on &c., died, and which said escape in this plea mentioned, is the same escape whereof the plaintiff hath in said first count in that behalf alleged ; and of this the defendant is ready to verify, &c.

The 9th, 10th, and 11th pleas, were to the 2nd count, and the same as the 6th, 7th, and 8th pleas, to the 1st count.

Demurrer to 6th plea ; because the note was pleaded by way of accord and satisfaction, and yet was for a less amount than the damages claimed ; also, because it appeared from the plea that the note was not a negotiable instrument, that it was useless to the plaintiff ; and also

because it did not appear to have been at any time paid to the plaintiff.

Demurrer to 7th plea: because the said plea was no answer to the causes of action in the said 1st count mentioned, inasmuch as the defendant had no right to take any bail to the limits for the said A. B.: and allowing the said A. B. out of his custody on the said bail bond to the limits, was in itself an escape, for which the defendant was liable on the said first count.

And because the said plea attempts to excuse the defendant from his liability for the said escape, complained of in the said first count, by reason of the said A. B. dying, to wit, &c., while he was out on the limits, as in the plea mentioned.

And because the defendant did not shew by the said plea, that he had the said A. B. in his custody on the return day of the said attachment,

And because the defendant had no right to take the bail bond in the plea stated.

And because the plea stated the bail bond to be taken according to the statute in that behalf, while there is no statute authorising such bail bond.

And because the plea was inconsistent in this, that the defendant says he had the body of the said A. B. on the return day of the said attachment, ready, &c.; while by the plea it appeared that the said A. B. was out on the limits on the return day of the said attachment.

And because the defendant, by his said plea, admitted an escape by the said A. B., and stated that he afterwards voluntarily returned into the custody of defendant; without shewing that the defendant did, during the time of the said escape, make any pursuit for the said A. B., or that he, the said defendant, had no notice, knowledge or information of the escape, between the time when it took place and the time of the return of the said A. B., or any excuse for not pursuing the said A. B.

And because the defendant attempted to set up the death of the said A. B., while he was so on the limits under the bail bond, as a legal discharge from the said writ of attach-

ment, and that he, the defendant, was thereby excused from having and retaining the said A. B., in his custody.

Demurrer to 8th plea : Because the defendant did not aver that he had no knowledge of A. B.'s escape, and made no excuse for not pursuing.

Upon the argument of these demurrers to the pleas, the declaration was objected to, on the ground that neither count disclosed any cause of action against the defendant, or at least only a nominal claim ; that neither count shewed for what the attachment was issued, nor that the defendant had not A. B.'s body, according to the exigency of the writ, nor any default of the defendant, nor any damages or loss to the plaintiff from any default of the defendant.

Phillpotts, for the demurrer. *Hagarty*, contra.

The following authorities were cited on the argument—5 Bing. N. C. 243 ; 2 M. & Gr. 921 ; 4 U. C. R. 181 ; 2 B. & Ad. 56 ; *Evans v. Shaw*, Draper's Rep. 14 ; 8 Jurist, 958 ; 4 U. C. R. 244 ; 1 U. C. R. 2 ; 1 Saund. 35 ; 1 B. & P. 413.

ROBINSON, C. J., delivered the judgment of the court.

The pleas demurred to are the 6th, 7th, and 8th, which are pleas to the first count ; and the 9th, 10th, and 11th pleas, which are the same answers in substance and form to the 2nd count.

As we consider the declaration bad, it is not necessary to go into any of the pleas. I will only say shortly, that it seems to me that the 6th and 9th could not have been supported ; not because the note spoken of was for a less sum than that indorsed on the attachment, for the principle that a less sum of money can be no satisfaction for a greater, would not apply to such a case, the action being for a tort, and the damages in the discretion of the jury, and the note of a third party being something different from money ; but the plea is in effect, that it gave to B. a note of C. payable to D. as a satisfaction of a debt due by A. to B. It is not said that the defendant procured Wilson to make the note at the plaintiff's request : or that it was delivered at the plaintiff's request ; nor shewn how it was to be of any value to the plaintiff. I dare say the facts may have been such as

admitted of a good defence of satisfaction, but the pleas would require to be amended.

The 7th and 10th pleas are the same. They assume the attachment to be mesne process, on which the sheriff could of his own accord take bail; or as process of execution, on which the prisoner could be admitted to limits after the return, as of course. It is not clear on the English cases how it should be viewed. There are cases both ways. Before the return, the sheriff cannot properly take bail for the appearance of the party without the order of a judge. If the plea shewed the party to be in upon the attachment after the return, as in execution, merely to compel payment of the money, then, according to what was determined in this court in *Rex v. Kidd*, Hilary Term, 6 Will. IV., he would have been entitled to the gaol limits, and then what is stated in these pleas might constitute a good defence; for clearly the party dying while legally on the limits could bring no liability on the sheriff.

The 8th and 11th pleas are clearly bad for the objection taken. The case of *Davis v. Chapman*, 5 Bing. N. C. 453, is quite in point.

But we think it clear that the plaintiff must fail on the demurrer, for that the declaration really states no good cause of action. The first count merely states a common cause of action against Mr. Richardson, as for a debt due to the plaintiff, and assumes that for such a debt the plaintiff could sue out an attachment against Richardson, as for a contempt; whereas such a process, for such a purpose, is unknown to our law, and the party could not be legally in custody upon it; and the first count is subject to other exceptions, for which we hold the second count to be also bad. They both assume that the plaintiff, for *collecting his debt due by Richardson*, could as of course sue out a writ of attachment for contempt (whether contempt of the plaintiff or of the court is not explained), and this without an order of the court.

If we are to regard the attachment as mesne process, intended to bring the party into court, in the first place, to answer for an alleged contempt, which is not shewn in this

case to have been specified on the writ, as is usual where the attachment is for the non-payment of money, then it should have been averred that the sheriff had him not in court to answer the exigency of the writ. This is not averred; but it is charged that, on the return day of the writ, the defendant allowed the party to go at large, which might have been perfectly proper if on that same day he had before produced the party in court, and he had been discharged as he might have been. It is not averred that the sheriff wrongfully, or contrary to his duty, suffered him to go at large.

If, on the other hand, we are to look on the attachment as in the nature of an execution, both before and after its return, then clearly it required something in the nature of a judgment to support it. If the plaintiff relied upon what took place before the attachment issued, as amounting to an adjudication of the contempt for which the attachment issued, then the order of the court should have been set out. If, on the return of the attachment, the court adjudged the party to be guilty of a contempt and directed him to be committed, and he afterwards on the same day escaped, then that should have been shewn; but here nothing whatever is set out to support the attachment as being in the nature of an execution. The case of *Brazier v. Jones*, 8 B. & C. 124, 2 M. & Ry. 88, &c., shews clearly that this declaration is not sufficient on either count.

In *Huntly v. Smith*, sheriff, 4 U. C. R. 181, the sheriff was sued for an escape of a party arrested on an attachment for not performing an award. There the party escaped on his way to gaol and before the return of the writ. Several exceptions were taken to the declaration, but we thought it sufficient on general demurrer, the defendant having pleaded over, and some of his pleas being demurred to; but in that case the order of the court for the attachment, and all the proceedings preliminary to the writ, were set out at length. It was not merely averred, as in this case, that the plaintiff had sued out an attachment for contempt, without stating what the contempt consisted in, or by what authority it had been determined he was guilty of a contempt.

No good legal foundation for the attachment is shewn on this record, and we are of opinion that the declaration would not on either count sustain an action for an escape.

Per Cur.—Judgment for the defendant on the demurrer.

JUDGMENTS DELIVERED ON THE 21ST AND 22ND AUGUST, 1849.

Present—THE HON. J. B. ROBINSON, C. J.

THE HON. MR. JUSTICE MACAULAY,

THE HON. MR. JUSTICE DRAPER,

THE HON. MR. JUSTICE SULLIVAN.

THE HON. MR. JUSTICE McLEAN in the Practice Court.

WATKINS AND MUCKLESTONE V. CORBETT, SHERIFF, &C.

Ship Registry Act, 8 Vic. ch. 5—Necessity of reciting the certificate of registry of ownership in a mortgage, under.

Under our Provincial Ship Registry Act, 8 Vic. ch. 5, secs. 13, 23, 24, the certificate of registry of ownership of a vessel is required to be recited in a transfer made by way of mortgage or security (with a power of sale in case of default) as well as upon an absolute and immediate sale; and where this is omitted, the mortgage will be wholly void.

Trespass for seizing a ship belonging to the plaintiffs, called the *Eleanora*.

Pleas: 1st. That the ship was not the property of the plaintiff.

2nd. Not guilty.

The trespass complained of was the seizing by the sheriff of the ship *Eleanora*, on 15th April, 1847, on a *fi. fa.*, at the suit of Hamilton v. McKenzie, issued a month before. In order to get possession of her from the sheriff, the sum of 234*l.* 4*s.* 10*d.* was paid, which satisfied the execution; and it was to recover that sum back that this action was brought.

The jury found for the plaintiff 247*l.* 4*s.* 10*d.*, which included interest; the sum had been paid under protest, and by agreement the verdict was taken, subject to any exceptions that might be raised on the evidence.

It was proved on the trial, that on the 20th December, 1844, McKenzie executed a mortgage of the vessel to Mr.

Hamilton, with condition to pay 550*l.* according to three promissory notes referred to, with power of sale in case of default. McKenzie to remain in possession in the mean time.

On the 6th of March, 1846, McKenzie executed a mortgage of the vessel to these plaintiffs, who are merchants, living in Kingston, reciting in it that he was indebted to Messrs Merrick & Co., American citizens, inhabitants of the state of New York, and stating that the mortgage was made to these plaintiffs as trustees for Merrick & Co., with power to sell in order to pay any balance that might be due to Merrick & Co., 1st May following, and to pay over any surplus to the mortgagee.

On the 31st December, 1846, McKenzie, reciting a debt then due by him to Merrick & Co. of 1300*l.* and upwards, and that they had agreed to make him a further advance of 1200*l.*, executed a further mortgage to these plaintiffs of the vessel, with authority to hold her upon trust, to receive all her freights and earnings, and apply the same to discharge the monies due to Merrick & Co.; and if these should not pay off the debt in a year, then to sell her for that purpose.

No certificate of registry of title as required by the Provincial Ship Registry Act, 8 Vic. ch. 5, was recited in either of these mortgages.

Upon the trial, a certificate of ownership was produced, given by the collector of the port of Kingston, shewing that on the 18th February, 1846, McKenzie was the registered sole owner of the *Eleanora*, a barque of 431 tons.

It was stated and not denied, that the *Eleanora* had been originally sold by Mr. Hamilton to McKenzie, or rather the hull of a large steamer which had been converted into the brig *Eleanora*; and that the debt for which the *fi. fa.* was issued was for an unpaid part of the purchase money, and therefore a debt justly entitled to priority.

After McKenzie purchased her, Merrick & Co. made him large advances towards repairing her, and relieving her from several executions which the sheriff held against her in the winter of 1847. Merrick & Co., being foreigners and living in the United States, had the mortgage taken in the

name of these plaintiff, as their trustees. One Donaldson was put in charge of her by these plaintiffs, in February, 1846; he had been in the employment of Merrick & Co. for seven years before that, and it was Merrick, in fact, who employed and paid him and gave him his orders. The money was advanced by Merrick & Co., through their attorney in order to relieve her from Mr. Hamilton's execution. These plaintiffs, though they were mortgagees in trust for Merrick & Co., with power to take possession, never in fact interfered; though Donaldson swore, on his examination, that when the Eleanora was seized by the defendant, under the writ, she was then in his possession, as agent to these plaintiffs, the trustees; and this was confirmed by Mr. Kirkpatrick, who was attorney at Kingston for Merrick & Co., and who stated that he delivered possession of her for these plaintiffs, who had consented to act as trustees to Donaldson, after she had been relieved from the first executions. Donaldson knew all the circumstances of the mortgage to the plaintiffs as trustees, and this defendant was also fully aware of them before he sold; but being indemnified, he proceeded under the writ.

It was objected that this action should have been brought in the names of Merrick & Co., they being *cestuis qui trusts* in possession.

2ndly. That the plaintiffs could make no title under the bills of sale or mortgages, for that they were invalid for want of the recital in them of the registered certificate of ownership, which it was contended the statute 8 Vic. ch. 5, requires.

3rdly. That even if those securities were valid, yet that McKenzie was the legal owner, subject to those incumbrances, and had an interest which the sheriff could sell under the 23rd section of the act.

4thly. That if McKenzie was not the owner of the ship by reason of the mortgages, then that Mr. Hamilton by that rule would be entitled to be regarded as the owner, rather than these plaintiffs, having the first security upon her.

McDonell, Q. C., obtained a rule upon the leave reserved. *Cameron*, Q. C., shewed cause.

The authorities cited were—8 Vic. ch. 5, sec. 13-23 ; 16 Law Jl. C. P. 147 ; 8 E. R. 231 ; 4 Bing. 45 ; 2 Cr. & J. 529 ; 2 Atk. 217 ; Cowp. 432 ; Lewin on Trusts, 485 ; 1 Madd. 395 ; 3 T. R. 406 ; 7 T. R. 306. As to plea—12 L. J. 223 ; 11 M. & W. 277 ; 13 M. & W. 107 ; 8 A. & E. 121 ; 4 M. & Gr. 427.

ROBINSON, C. J., delivered the judgment of the court.

For some reason of convenience to the parties, this case has been suffered to lie for some time unargued. We have had no difficulty in making up our minds upon it, after the facts were fully before us.

The plaintiffs seem to have brought this action under some idea that they had reason to complain of the sheriff as having acted unfairly towards them, and having taken them by surprise with this fresh seizure at Mr. Hamilton's suit, in April, 1847, though he had stated some weeks or months before that the executions which he then held against the vessel, and which the plaintiffs discharged, were all the claims he had upon her. The sheriff, no doubt, spoke truly so far as regarded any executions which he had received up to that time ; but he could give no assurance (and it was not reasonable to imagine that he meant to do so) that no other execution would afterwards come against McKenzie ; and whenever any other such execution might come, of course it must be known that he would be obliged to do whatever his duty should require.

Then we have to consider whether the Eleanora was in law liable to the execution at the suit of Hamilton, when it came to the sheriff, in April, 1847.

It was no doubt liable, unless by reason of the transfers which had before been made to these plaintiff. Their validity is denied, on the ground that they do not contain in them any recital of the certificate of ownership, such as our Ship Registry Act, 8 Vic. ch. 5, sec. 3, renders indispensable.

The defendant relied upon this at the trial. It did not seem to me that the 13th clause of that statute extended to mortgages ; at least, I recollect that that was my impression, and I believe I intimated so at the trial, though the point was reserved for more deliberate consideration.

After examining the question, I now think otherwise; and I believe we all are of opinion that the certificate of registry of ownership is required to be recited in a transfer made by way of mortgage or security, as well as upon an absolute and immediate sale, though it would not seem so on the first impression.

The clause enacts, "that when and so often as the property in any ship or vessel, or any part thereof, shall, after being granted certificate of ownership, *be sold* to any others of her Majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of ownership of such ship or vessel, &c., otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or equity."

Then the 23rd clause enacts, that when any transfer "of any ship or vessel shall be made only as security for the payment of a debt, either by way of mortgage or assignment to a trustee, for the purpose of selling the same for the payment of any debt, then the person to whom such transfer shall be made shall not by reason thereof be deemed to be the owner of such ship or vessel, nor shall the person making such transfer be deemed by reason thereof to have ceased to be the owner, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel available, by sale or otherwise, for the payment of the debt, for the securing the payment of which such transfer shall have been made."

By persons accustomed to construe acts of parliament by their language, and not familiar with the practice under the ship registry laws, it might, I think, be naturally understood from these clauses read in connection, that in mortgages of ships the certificate of registry of ownership need not be recited; for when we speak of "*the property in a ship being sold,*" we do not ordinarily include the idea of a mere security being given on the ship, and still less would we commonly understand that to be meant by a statute, which provides in such express terms that the person mortgaging shall not be deemed to have ceased to be the owner, but that he, and not the mortgagee, shall be deemed to be

the owner, as if no such mortgage had been made. But the saving which follows may properly have a great effect on determining how we are to understand this latter clause—"except so far as may be necessary for rendering the ship or vessel available, by sale or otherwise, for the payment of the debt secured."

This law of shipping is in a great measure new to us. In England, it has formed for ages a very important branch of the law, and the courts are familiar with the object and intentions of the legislature in the different provisions respecting them, which have been embodied in a multitude of statutes. In the cases cited of *Dean v. McGhe et al.* 4 Bing. 45, and *Kerswell v. Bishop*, 2 Cr. & J. 539, as well as in others, it seems to have been clearly held that the provision which I have cited from the 23rd clause was intended merely for the benefit of the mortgagees, that they might not be burthened with the liabilities and charges of owners, while they had not in fact the possession and management of the ship, and that the provision was not in any way to prejudice their security. The courts have accordingly held that, when the mortgagees are in possession that clause does not apply.

One can see at once that this is a very reasonable footing for the law to rest upon, but yet it would appear, I think, that the statute is by no means happily expressed if that were (as I suppose it was) the intention of it. It would have been very easy, I mean, to have ensured that construction being given to the act, without the necessity of seeming to act so much in disregard of its language. But conforming as we shall do to these decisions upon clauses precisely like ours, and from which we must see that our act was framed, we are to regard the mortgagees in this case as the actual owners, being in possession under a bill of sale; for whether they or their *cestuis qui trusts* were actually in possession, the effect would be the same on this question, *McKenzie* being equally out of possession.

We have to take the case on the effect of the 13th clause alone, the 23rd not being applicable under the circumstances; and we think it is clear, from the recent decisions

in England, and clear also on the reason of the thing, that these plaintiffs taking a bill of sale of McKenzie's interest, though only as a security, but with the power of selling the vessel in order to satisfy their debt, were bound to take care that such bill of sale contained a recital of the certificate of registry. The 23rd and 24th clauses of the statute clearly indicate the intention that the means shall exist of tracing all such securities.

The object of the statute, it is clear, is to preserve the means of shewing the identity of the vessel. The kind of bill of sale taken in this case is the common one used in England for the same purpose; the same transfer by way of security, with power of sale to satisfy the debt, and with power also as in this case to take the vessel into the hands of the mortgagee and apply the earnings to the discharge of the debt. It is clear, that when the mortgagee uses the power to sell, as he may do at any time after default, his sale becomes an absolute transfer of the property of the ship, and every reason for securing the proof of identity applies as well as in the case of sales made directly by the absolute owner; but unless the bill of sale taken by the mortgagee is required to contain a recital of the certificate, he would be without the means in general of inserting it in the sale made by himself, and the object of the statute would be lost.

I cannot say therefore, that I have any doubt that the legislature must have meant that, in cases like the present, the certificate should be recited in the transfer; and in *Boyson v. Gibson et al.*, 16 L. J. C. P. 147, it is plainly assumed.—See 9 E. R. 231; 3 T. R. 406; 7 T. R. 306.

Then this being so, as the statute is express that the bill of sale without such recital of the certificate of ownership, "*shall not be valid or effectual for any purpose whatever,*" we cannot hold it to be valid for enabling the plaintiffs to maintain their title under it against the defendant, who has seized under an execution against the owner who made this invalid instrument.

The bill of sale constituted this plaintiff's only title. The defendant took the *Eleanora* not out of their actual posses-

sion, but out of the possession of a person who was employed in fact by Merrick & Co., and received his instructions from them and accounted to them. The plaintiffs therefore felt that, without the bill of sale, they had nothing to stand upon; and we think that upon the issue on the record denying their property, the defendant was clearly entitled to succeed, though he had not pleaded specially his authority under the writ.—13 M. & W. 107.

It is unnecessary to go into the other question raised, namely, whether these plaintiffs were entitled to bring trespass, even if their bill of sale had been valid, which it is contended they were not, on account of their not being actually in possession of the vessel.

COCHRANE V. EYRE ET AL.

Nul Tiel Record—Variance—Pleadings.

Debt on recognizance of bail entered into in the District Court. Plea—that no *ca. sa.* had been duly sued or prosecuted out of the District Court: Replication—that the plaintiff did sue out and prosecute a *ca. sa.*, setting it out, and praying that a day might be given to bring in the record. The record certified to this court by the judge of the District Court, *agreed with the replication.* *It was therefore held per Cur.,* that under the issue, no objection could be taken to the *ca. sa.*, as in some particulars varying from the judgment. *It was also held,* that it was no objection that it did not appear upon the record that the *ca. sa.* had lain four days in the sheriff's office before the return day, this being matter of practice of another court, and not made the subject of inquiry upon the issue raised in this court.

Debt on recognizance of bail in the District Court of the District of Newcastle, in a cause there pending of Cochrane plaintiff, against one Porter.

The defendants pleaded that “no writ of *ca. sa.* was duly sued or prosecuted out of the said District Court of the Newcastle District against the said Porter, upon the said judgment, at any time after the recovery thereof and before the commencement of this suit, and this,” &c.

The plaintiff replied, that “the plaintiff, after the recovery of the judgment and before the commencement of this suit, viz.—on the 23rd September, 12 Vic., sued and prosecuted out of the said District Court a certain writ of our said Lady the Queen, called a *ca. sa.*, upon the said judgment against the said Porter directed, &c.,—setting out the writ; which

said writ afterwards and before the said return thereof, to wit, on the 26th September, 1848, was delivered by the plaintiff to the sheriff of, &c., to be executed, &c., and afterwards, according to the course and practice of the said District Court, to wit, on the 23rd of October, 1848, before the judge of the said District Court came the plaintiff in his own proper person, and the sheriff that day returned to the said court that the said Porter was not found in his district, as by the said writ of *ca. sa.*, and the return thereof duly filed and remaining of record in the said District Court more fully appears, and prays that a day may be given to bring in the record.

The record certified to this court by the judge of the District Court, agreed with the replication; but it was objected on the part of the defendant, that the *ca. sa.* varied from the judgment in the District Court, being *on promises and undertakings*, whereas the judgment is alleged in this declaration to have been recovered on occasion of the not performing certain promises then lately made (not containing the words "undertakings.")

2. That the *ca. sa.* appeared to be tested before the judgment was entered.

3. That it did not appear that the *ca. sa.* had lain four days in the sheriff's office before the return.

The recovery of the judgment was laid with a *videlicet* to have been on the 23rd September, 1848.

The writ was tested on the 10th June, 1848, returnable on the 23rd of October, issued 23rd September.

Leith moved for judgment, on the plea of *nul tiel* record.

Eccles shewed cause, stating the grounds above mentioned. The authorities cited were—7 B. & C. 800; 2 Ch. Rep. 102; 5 M. & S. 323; 1 H. Bl. 74.

ROBINSON, C. J., delivered the judgment of the court.

There is nothing in any of the exceptions taken. The plaintiff is entitled to judgment. The *ca. sa.* is such as the plaintiff has set out in his replication; whether it did or did not vary in some trifling particular from the judgment, is not the question on this issue.

The *ca. sa.* is not void for any cause assigned, and its

being required to be four days in the sheriff's hands, is mere matter of practice of another court, which we are not to inquire into upon this issue.

Per Cur.—Judgment for the plaintiff.

GUNN V. McDONALD.

In an action for a malicious arrest on a *ca. sa.*, when there was no cause for believing that the plaintiff had made any secret or fraudulent conveyance of his property in order to prevent its being taken in execution, the question to be submitted is, not whether an assignment of the property *really is* fraudulent or not, but whether the defendant *has reason* to suspect that it is so.

Case for malicious arrest on a *ca. sa.*, when there was no cause for believing that the plaintiff had made any secret and fraudulent conveyance of his property in order to prevent its being taken in execution.

General issue and other pleas.

Richards obtained a rule for setting the verdict aside, as being contrary to law and evidence, and the judges charge.

J. Lukin Robinson shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

On the evidence, it seems to us that the jury should have been told, that probable cause for making the affidavit and suing out the writ was made out, and that the defendant was entitled to a verdict.

It was left, however, to the jury to determine whether the assignment of his property, which the plaintiff did make to one McDonald before suing out the *ca. sa.*, was in fact fraudulent or not, as if the case must necessarily turn upon that; and they found for the defendant, contrary as it seems to the weight of evidence.

But whether the assignment really was fraudulent or not, was not properly the question, but whether this defendant had reason to suspect that it was so; and we think such strong reasons were shown, from the conduct and declarations of the debtor, and from the manner in which the property was allowed to be dealt with after the assignment, that the plaintiffs in the suit had ample cause for making the affidavit and suing out the *ca. sa.*

It is not necessary to the protection of suitors making affidavits in such cases, that they should *know* the assign-

ment which is set up to be fraudulent, and that it should be afterwards made out to the satisfaction of a jury to have been fraudulent.

It is sufficient to relieve the party making the affidavit from the imputation of acting maliciously, if he shews to the conviction of the judge at the trial that the circumstances attending the transfer were such as would reasonably lead to the belief that it was colourable and pretended and not a *bona fide* transaction.

We think that must be said of the present case by any one who considers the evidence, and the learned judge who tried the cause has the same impression of it.

Per Cur.—Rule absolute for new trial—costs to abide the event.

DAVIS V. FORTUNE.

Malicious arrest—Agency of Defendant—Averments in declaration.

Where it was averred in the declaration against a defendant for a malicious arrest—that *by virtue of the affidavit* of the defendant, he the defendant, *maliciously caused* a writ to be sued out for arresting the plaintiff, when he had no probable cause for believing that the plaintiff had made any fraudulent conveyance of his property, and that he further *maliciously caused* the writ to be endorsed and delivered to the sheriff, &c. *Held, per Cur.*, that these facts, if found by a jury, constituted in themselves *the agency* of the defendant for the plaintiff in the suit, and that the agency need not otherwise be more positively averred.

The action was case for malicious arrest on a writ of *ca. sa.*, issued out of the District Court of the District of Victoria, at the suit of Francis M. Hill, against the present plaintiff and three others.

The declaration charged that the defendant, on the 30th March, 1848, not then having any reasonable or probable cause for believing that this plaintiff had parted with his property, or made any secret or fraudulent conveyance thereof, in order to prevent its being taken in execution, but wrongfully and unjustly intending and contriving to imprison, harrass and injure the plaintiff, maliciously and vexatiously made a certain affidavit that he, the defendant, had reason to believe that one John R. Macaulay, one Alexander Cumming and the now plaintiff, had parted with their property, or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution,

and that afterwards and before the commencement of this suit, to wit, on the 4th of April, 1848, as of — term, in the month of March, in the year aforesaid, *he, the defendant, not having any reasonable or probable excuse for believing as aforesaid, but contriving and intending, as aforesaid, did wrongfully, maliciously and falsely by virtue of the said affidavit, cause and procure to be sued out of the District Court of the District of Victoria, a writ of ca. sa. directed, &c., by which, &c., (setting out the writ); that the sheriff should take John R. Macaulay, Alexander Cumming, George Dalton and the now plaintiff, if they should be found, &c., returnable first day of June term next, to satisfy Francis M. Hill for the sum of 49l. 0s. 2d., lately before, &c., had recovered against them &c.*

The declaration then charged—

That the defendant further contriving, and vexatiously and maliciously intending *as aforesaid*, afterwards, viz. on the 4th day of April aforesaid, *maliciously and vexatiously, and without having any reasonable or probable cause for believing that the now plaintiff had parted with his property, or made any fraudulent or secret conveyance thereof, in order to prevent its being taken in execution, caused and procured the said writ to be endorsed with a direction to the sheriff to take John R. Macaulay, Alexander Cumming and the now plaintiff, for 51l. 15s. 4d., with interest, &c., and so indorsed to be delivered to the said sheriff to be executed according to law; and the said writ being so indorsed and delivered as aforesaid, the now defendant afterwards, and before the return day of the said writ and before the commencement of this suit, viz., on the 22nd of April, in the year aforesaid, contriving and maliciously intending as aforesaid, and without having any reasonable or probable cause for believing, &c., (as before) wickedly, maliciously and vexatiously caused the now plaintiff to be arrested by his body, under and by virtue of the said writ, and to be thereupon kept and imprisoned for a long space of time, &c. (and until he procured bail for the limits).*

And thenceforth the defendant, *wrongfully and maliciously, and without any reasonable or probable cause as*

aforesaid, caused the plaintiff to be kept and confined to the said limits, under and by virtue of the said writ, for a further space of time, &c., until the plaintiff was forced to pay the moneys so indorsed on the said writ. Whereas, in truth and in fact, the now defendant, at the time of the suing forth of the said writ and of the said arrest and imprisonment, and after the said confinement to the said limits, had not any reasonable or probable cause for suspecting or believing that the plaintiff had parted with his property, or made any fraudulent or secret conveyance thereof, in order to prevent its taking in execution (averring special damage, and concluding "to plaintiff's damage of 500*l.*")

Plea: Not Guilty.

Verdict for plaintiff, 26*l.*

The defendant moved in arrest of judgment.

The exceptions pointed out in the rule *nisi* as grounds for arresting the judgment, were, that it was not stated that the defendant was or acted as the agent of the plaintiff in making the affidavit referred to, or in any of the proceedings alleged to have been taken by the defendant, or that the affidavit was sworn or made in any cause or in any court.

Vankoughnet obtained a rule in arrest of judgment, upon the grounds—

1st. That it was not stated in the declaration that the defendant was or acted as the agent of Hill the plaintiff in the suit, in making the affidavit referred to, or in any of the proceedings alleged to have been taken by the defendant.

2nd. That it was not stated that the affidavit was sworn or made in any cause, or in any court.

Richards shewed cause.

The authorities cited were, 4 U. C. R. 211, 377; 3 Dowl. 720; 10 B. & C. 216; 1 B. & C. 145; 4 Q. B. R. 481; 2 Ch. Rep. 304; 3 U. C. R. 138.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the declaration states a sufficient cause of action. Whether the affidavit mentioned in the declaration was regular or not, not being alleged to have been sworn in any cause or in any court, still it is

averred as a fact that by virtue of it the defendant maliciously caused a writ to be sued out for arresting the plaintiff, when he had no probable cause for believing that the now plaintiff had made any fraudulent conveyance of his property.

It would be no protection to this defendant against the consequence of his alleged malicious act, that his affidavit was irregular, so long as it appears (which the jury have found) that he did make such an affidavit and caused the writ to issue, which we know without an affidavit could not have issued.

And then the declaration charges other acts to have been maliciously done by the defendant, which caused the arrest, namely—the procuring the writ to be indorsed with a direction to take the now plaintiff for a certain sum, and the delivery of the writ to the sheriff, and causing this plaintiff to be arrested under it. The doing these things constitutes in itself the agency for the plaintiff on the writ, which the defendant contends is necessary to be shewn, and each act so done is averred to have been done maliciously, and for the purpose of injuring the now plaintiff without probable cause to warrant it. All this, we must now take it, has been proved; and we cannot say that a sufficient cause of action is not charged, though the result of this action does not establish that everybody who under any circumstances takes a step towards making an arrest which originates in malice, is necessarily liable to such an action. Each case must be supported by the finding of the jury and the opinion of the judge on the facts proved.

Per Cur.—Rule discharged.

LOCKE V. WILSON.

Case for maliciously suing out a commission of bankruptcy—Necessary averments in declaration.

In an action for maliciously suing out a commission of bankruptcy against the plaintiff, it should be distinctly averred in the declaration, that the defendant *acted without cause*—the averment that defendant *falsely and maliciously* swore to the debt, &c., is not sufficient.

The declaration should also state, that the commission of bankruptcy issued upon the affidavits set out, and that the affidavits were made before a competent authority.

It should also be averred, that the commission was superseded before the action was commenced.

Case for maliciously suing out a commission of bankruptcy against the plaintiff. The declaration, in the 1st count, averred—that whereas the plaintiff before, &c., had not committed any act of bankruptcy, nor was indebted to the defendant in any debt sufficient to support a commission of bankruptcy, but was in great repute, &c.; yet the defendant well knowing the premises, &c., falsely and maliciously caused and procured the plaintiff to be declared a bankrupt, went before one, &c., a commissioner, &c., and falsely and maliciously swore that he the plaintiff was justly indebted to the defendant in the sum of, &c., for, &c.; and further made oath and said, that the said plaintiff, as the said deponent then verily believed, was a trader within the meaning of the statutes of this province relating to bankrupts—that is to say, &c.; and that on the 14th of July, 1848, a summons according to the statute was duly issued by David S. McQueen, Esquire, Judge of the District Court of the District of Brock, against the said plaintiff, at the suit or instance of the said defendant, requiring the said plaintiff to be and appear, before, &c., which said summons was duly served on the said plaintiff; and the said defendant further swore and said, that the said plaintiff did appear at the call of the said summons, and upon his appearance upon such summons, did refuse to admit the demand of the said defendant, and did not make a deposition in the form prescribed by the statute in that behalf; that he believed he had a good answer to the said demand of the said defendant, and had not within twenty-one days after personal service of the said summons secured the said demand of the said defendant to the satisfaction of the said defendant, or entered into a bond, with two sufficient securities, in manner and form prescribed by the statute in that behalf; and the defendant further contriving, &c., did afterwards falsely and maliciously cause and procure the said affidavit to be presented to David S. McQueen, Esquire, Judge, &c.; and then further contriving as aforesaid, maliciously caused and procured to be sued and prosecuted out of the said Court of Bankruptcy for the District of Brock a commission of bankruptcy of our said Lady the

Queen, sealed, &c., against the said plaintiff; and the said defendant then further contriving and intending as aforesaid, maliciously caused and procured the said plaintiff to be declared a bankrupt, &c.; and the plaintiff further saith, that afterwards, to wit, on the first day of January, 1849, the said commission was duly superseded.

The 2nd count contained no averment of the commission being superseded.

Demurrer to 1st count: Because the plaintiff, in and by his first count, does not allege that the said commission of bankruptcy was falsely or without probable cause sued out of the said Court of Bankruptcy; and although it is alleged that the said affidavit in the first count mentioned was falsely and maliciously sworn to, yet it is not alleged that the said commission was issued upon such affidavit, and for all that appears in the said first count, the said commission may have issued upon another and different affidavit.

And also, because it is not alleged that the said commission was superseded upon any such ground as the falsehood of any proceedings of the defendant, or upon any ground from whence it might be inferred that the defendant had not probable cause for suing out the same, and for anything which appears in the said first count to the contrary, the same may have been superseded upon some point or matter of form; and as the suing out of the commission was the act of the defendant, from whence it is alleged in the declaration that damage resulted to the plaintiff, the same should have been averred to have been done falsely and without probable cause.

And also because it is not in and by the said first count shewn, by what person, or court, or authority the said commission was superseded.

Demurrer to 2nd count: Because it is not alleged in the said second count that the said commission of bankruptcy therein mentioned was sued out falsely and without probable cause; but it is only alleged that by the said commission the plaintiff was falsely and maliciously declared a bankrupt, thus attributing to the mere effect of the commission falsehood and malice which is absurd.

And also because it is not alleged in the said second count, that the said commission in that count mentioned was before the commencement of this suit superseded.

McLean, for the demurrer. *Eccles contra*. The authorities cited were—3 Camp. 58; 2 B. & Ad. 695; 4 Taunt. 7; 1 B. & Ad. 128.

ROBINSON, C. J., delivered the judgment of the court.

The first count seems to be defective in not shewing distinctly in what respect the defendant acted without probable cause, whether as to the existence of any debt, or as to the plaintiff being a trader, or what. In fact it does not lay any thing to have been done without probable cause, but only falsely and maliciously. The allegation is not that the defendant had not at the time he made the affidavit any demand against the plaintiff sufficient to support a commission of bankruptcy. Plaintiff does not explicitly deny that he owed the debts sworn to, or any of them, and he may therefore be tendering an issue in law that they were not any of them sufficient to support a commission.

Then he does not aver that defendant had not probable cause for believing that plaintiff owed him the debts alleged, but only that he falsely and maliciously swore to the debt.

And the declaration is bad in not expressly stating that the commission issued upon the affidavits set out. It is not alleged that the defendant made the affidavit of service, and of plaintiff's default in swearing the debt, &c., before any competent authority. The commission in this case was not founded in any other alleged act of bankruptcy than the plaintiff failing to pay a sum then demanded, or to make oath that he believed he had a good defence to it, one of which things certainly he should have done, whatever might have been the truth as to the alleged debt.

The commission also should have been expressly averred to have been superseded before this action was commenced, according to the authority of the case of *Whitworth v. Hall*, 2 B. & Ad. 695, though certainly the precedents do not in express terms allege that. It seems to me a clear

ground against this count that it does not charge that the defendant acted without probable cause. The case of *De Medina v. Grove*, 11 Jurist, 145, is an authority precisely in point, for there the declaration did aver, as this does, that the defendant "well knew," &c., which it may be argued amounts to an indirect assertion that he had not probable cause.

The 2nd count, besides this defect, does not shew the commission superseded at all, and for that reason alone is insufficient.

Judgment for defendant on demurrer.

Leave to amend.

CHASE V. GILMOUR.

Rule of Michaelmas Term, 4 Geo. IV.—Affixing Notice of Trial in Deputy Clerk of Crown's Office.

A copy of a notice of trial can only be affixed in the office of the Deputy Clerk of the Crown in the district in which the action is brought—where therefore a *testatum* writ only had been issued into the district where the notice had been put up, the notice of trial was held to be irregular.

The defendant moved to set aside verdict on the ground of irregularity, the notice of trial being served on the 1st of May, and the assizes commencing on the 7th of May; or for new trial on affidavit of merits.

The plaintiff declared in trover.

Pleas: 1st. Not guilty.

2nd. Plaintiff not possessed.

The evidence was the plainest possible, to prove the property and conversion of a horse.

The affidavit of merits was made by the defendant on the general terms, that he had a good defence to this action upon the merits, as he was advised and believed.

The notice of trial was sworn to have been served on the 1st of May, on the clerk of the defendant's attorney, the assizes commencing on the 7th; and on the 5th of May, notice was served on the plaintiff's attorney that the defendant would except to the notice as insufficient. The defendant proved that he affixed another copy of notice of trial in the Deputy Clerk of the Crown's office of the district in which the defendant was sued.

ROBINSON, C. J., delivered the judgment of the court.

The notice of trial served on the defendant's attorney, was clearly irregular, the time being too short.

Then as to the copy affixed up in the Deputy Crown office, that, under our rule Michaelmas 4 Geo. IV., would be sufficient where the notice was affixed up in the district in which the action was brought; but in this case the notice was not so affixed, a *testatum* writ only having been issued into the district where the notice was put up. The 2nd clause of the 8th Vic., chap. 36, under which the *testatum* issued, expressly provides that in all such cases the service of papers shall be made upon the defendant or his attorney, or upon the agent of his attorney in Toronto. We must therefore make the rule absolute.

Per Cur.—Rule absolute.

CORBETT, SHERIFF, V. MCKENZIE.

Sheriff—Ca. sa.—When entitled to poundage under.

Where the sheriff has the party in custody on a *ca. sa.*—*Held per Cur.*, that he has so far made the money (the body being satisfaction) as to give him his claim to poundage under our rule of Hilary Term, 10 Vic. No action lies by the sheriff against the *plaintiff's* attorney to claim poundage upon an execution which the attorney has placed in his hands to be executed.

This was an action of assumpsit, brought by the sheriff of the Midland District against the defendant, an attorney of this court, to recover the sum of 19*l.* 13*s.* 3*d.*, of which 8*l.* 18*s.* was for poundage on a writ of *ca. sa.* in the case of Fralick v. Huffman in this court, the sum of 3*s.* 4*d.* for similar charges on a writ of *ca. sa.* in the case of Gannon v. Lloyd in this court, and 4*l.* 4*s.* for similar charges on a writ of *ca. sa.* in the case of Macfarlane v. Kennedy in this court.

In the cases of Fralick & Huffman and Gannon & Lloyd, the defendants respectively were arrested by the plaintiff in this suit, upon writs of *ca. sa.*, which were placed in his hands for execution by the attorney of the defendant in this suit, and afterwards admitted to the limits of the Midland District gaol and discharged from close custody, under the provisions of the statute 10 & 11 Vic. ch. 15.

In the case of Macfarlane & Kennedy, the defendant was arrested by the plaintiff in this suit on a writ of *ca. sa.*, which was placed in his hands for execution by the defendant in this suit, and afterwards was discharged by a judge's order, under 10 & 11 Vic. ch. 15, sec. 3.

It was admitted that the above mentioned sums were correct in amount; and the only question for the court to decide was, whether they were lawfully chargeable against the defendant.

It was agreed that a verdict should be entered in this case for the plaintiff against the defendant, for all or such part of the sums above mentioned as the court should think lawfully chargeable against the defendant, together with Queen's Bench costs, to be taxed by the Master; but if the court should be of opinion that none of the above mentioned sums were lawfully chargeable against defendant, then it was agreed that judgment should be entered for defendant against the plaintiff, for Queen's Bench costs of defence, to be taxed by the Master.

Burrows for the plaintiff. *McKenzie* contra.

The authorities cited were—2 C. & P. 118; 5 B. & C. 328; 2 B. & Ald. 562; 2 M. & S. 438; 12 Vez. jr. 349; 3 B. & Ad. 47; 11 Jur. 60, 610; 3 Campb. 374; 5 M. & W. 620; 7 M. & W. 463.

ROBINSON, C. J., delivered the judgment of the court.

Whatever opinion we may form upon the sheriff's right to claim poundage under the circumstances stated in the case, we think we could not give our judgment for the plaintiff in this action, because we consider it to be settled by several decisions in England, and although, where an attorney for a plaintiff employs a special bailiff of his own to execute any process, he will be liable personally to such bailiff, because he makes him his servant upon the occasion, yet no action lies by the sheriff against a plaintiff's attorney to claim poundage upon an execution which the attorney has placed in his hands to be executed.

The principal question in the case—that is, whether the sheriff can legally demand poundage in such cases as are

stated, we have found to require much careful consideration.

The English statute 29 Eliz. gave the sheriff poundage upon executions against the body, land, or goods, after a certain rate in the pound, upon such sum as the sheriff shall levy or extend and deliver in execution, "*or take the body in execution for.*" This shews that in the judgment of parliament, at that day, when fees were not allowed with reckless liberality, it was thought reasonable that the sheriff should have his poundage if he took *the party in execution*, whether the plaintiff did or did not receive his debt in money in consequence of the arrest. And this is not unreasonable, because the sheriff's responsibility is complete when he takes the party, and it is a heavy responsibility—he is fixed with the whole debt, if the debtor escapes from him.

Our first King's Bench act 34 Geo. III. ch. 2, gave a table of fees; and it gave the sheriff in these general terms poundage on executions, viz., "6*d.* in the pound on the first 100*l.*, and 3*d.* in the pound when for any amount over that." It did not distinguish among the different kinds of execution, nor direct what service rendered by the sheriff should entitle him to poundage.

Our later King's Bench act 2 Geo. IV. ch. 1, gave the court authority to appoint the fees to be taken by all officers of the court, which authority still continues; and the 19th clause of that act provides that it shall be lawful, on any execution against the person, land or goods, for the sheriff to levy the poundage fees and expense of execution, over and above the sum recovered by the judgment.

Here the sheriff, not having succeeded in levying the money (if that expression be properly applicable in the case of *ca. sa.*) under these writs against the debtors, makes his claim for the fee on the plaintiff (as we will for the present consider) for the purpose of this question.

The provincial statute 7 Will. IV. ch. 3, sec. 32, has been referred to, as containing a provision material to be considered. That applies, however, wholly to executions against lands or goods. It so far bears upon the question,

that it shews that the legislature thought it expedient, where the money is not actually made upon such process, that the sheriff should be compensated for the services rendered and should not receive poundage, at least in the case of executions going into several districts, and it may be contended that the provision extends to cases also where execution has gone into one district only, though the legislature would seem not to have intended that. The enactment has the appearance of going beyond the preamble.

Then laying this statute on one side, as I think we may, for it cannot influence our decision, we must look at our tariff of fees, established under the statute 2 Geo. IV., and which, being made under its express authority, has the force of a positive law, as much as if the tariff had been given in the act.

Our existing tariff is that established by the rule of this court, Hilary Term, 10 Vic., which gives poundage to the sheriff in these words: "Poundage on executions and on attachments in the nature of executions, *where the sum levied and made* shall not exceed 100*l.*, 5 per cent.; where it shall exceed 100*l.* and be less than 1000*l.*, 5 per cent. for the first 100*l.* and 2½ per cent. for the residue (and gives another scale where the sum is over 1000*l.*); in lieu of all fees and charges for services and disbursements, except mileage in going to serve and disbursements for advertisements, and except disbursements necessarily incurred in the care and removal of property in cases not exceeding 100*l.*, allowed by the master in his discretion." In the same tariff, a fee of 5*s.* is allowed to the sheriff for arrest upon a *capias*, besides a charge of mileage in going to make the arrest, per mile, without stating expressly whether a *capias* in execution is intended to be included. It is, I have no doubt, in effect included. When the debt exceeds a certain sum, a fee of 20*s.* is given for the arrest. When poundage is clearly allowed to the sheriff, then the table deprives him of this: for when he has no claim to poundage, he gets only the specific fees I have mentioned.

Now the question before us is, can the sheriff claim

poundage on a *ca. sa.*, where he has arrested a debtor and held him in custody till the court has discharged him as insolvent, under our statute 10 & 11 Vic. ch. 15? In one sense certainly, and that the most common sense, there has been no money levied or made, which are the words of our rule; that is, no money has been received or paid over by the sheriff, nothing has passed through his hands. But this is never expected to take place on a *ca. sa.*, even were it has the effect of producing payment of the debt, for payment to the sheriff is not legal, and in strictness does not discharge the debtor; the sheriff ought not to receive it, but the plaintiff's attorney. It is not for that, therefore, that he is considered to receive poundage in any case on a *ca. sa.*

He would, I think, be clearly entitled to it, although after arrest the debt should be paid by any compromise, or secured, and the party discharged by the plaintiff without payment. The law, I take it, is conceded to be such here, as well as in England. But it may be said that in such cases the plaintiff may without impropriety be held to have received the money by force of the writ, because the party may be looked upon as paying by compulsion; and so the money may be held to be levied or made not literally, but so as to satisfy the plaintiff and entitle the sheriff to his poundage.

Here it may be said with truth by the plaintiff that he has not been satisfied, for the debtor has been discharged because he has satisfied the court that he was wholly unable to pay. And there is an apparent hardship, if the plaintiff has to pay poundage when he has received nothing; but the hardship would always have been the same here, or in England, where the party dies in execution, or is rescued, or remains in custody without paying; and yet in all such cases I take the claim for poundage by the law of England to be clear.

If we should deny it here, it would only be because of the words in our tariff, levied *or made*; but I think we should not hold that these words have altered the law in regard to this description of process. They apply properly to execution of writs of *fi. fa.*, while the allowance of poundage is clearly

given upon all writs. The addition of the words "*or attachments in the nature of executions,*" makes that clear. Then, in my opinion, we are to apply the words levied and made, in their literal sense, to levies made under *fi. fa.*; which has always entitled the sheriff to poundage on the sum levied, and no more because he is answerable for no more and has no more in charge. But on a *ca. sa.* he never levies and makes any thing; the words as to that writ have no literal application. If they apply at all it is in this sense, that the body when taken is satisfaction. The sheriff, when he has taken the body, has fully executed the writ, so far as making the debt is concerned; he becomes liable for the whole debt if the party escapes. The debt is in a legal sense satisfied while the party is in custody, and the sheriff's right to poundage is then complete, and cannot be divested by any act of the law or the court, or by the death of the party, being all matters over which the sheriff has no control.

By a special provision of the law, when the debtor is discharged under this act the plaintiff can take execution against his property nevertheless; and it may be objected, that if the sheriff should make the debt upon such writ, there would be a double charge of poundage; but so there might be here or in England, in case of the debtor dying in custody, or being rescued, or escaping; and there is nothing unfair in it, for the double charge would be for a double service and for a double responsibility.

On the whole, we think, where the sheriff has the party in his custody on a *ca. sa.*, he has so far made the money (the body being satisfaction) as to give him his claim for poundage under our rule, as was the case here before that rule, and also in England till the recent statute 5 & 6 Vic. ch. 90, sec. 31, which has taken away poundage on a *ca. sa.*

Per Cur.—Verdict to be entered for the plaintiff.

EASTMAN V. REID

Illegal conviction by magistrate—Illegal warrant.

A magistrate, in order to have a good justification under a conviction and warrant, must give in evidence a conviction *not illegal on the face of it*, and a warrant of distress supported by that conviction, and not on the face of it an illegal warrant.

Held therefore Per Cur., that a magistrate's conviction "for wilfully damaging, spoiling, and taking and carrying away six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels of the said Rogers," did not support a warrant, which recited, "that whereas judgment was given against Jonathan Eastman, of, &c., in a *suit Rogers v. Eastman*, for a *misde-meanour* in taking apples by force and violence off and from the premises of the said Rogers, &c., these are therefore to authorize, &c.;" and also that neither the conviction nor the warrant contained a *statement of an offence* for which such a conviction could take place.

Appeal from the District Court of the Home District.

Trespass against a magistrate for seizing and selling a horse of the plaintiffs.

Plea: Not guilty per statute.

The whole question turned upon the legality of the conviction, and warrant obtained under it.

The conviction was in the following words:—

"Be it remembered, that on the 24th December, A. D. 1847, at the township of East Gwillimbury, in the Home District, Jonathan Eastman, of the township of King, in the said district, yeoman, is convicted before me, William Reid, one of Her Majesty's justices of the peace for the Home District, for that he the said Jonathan Eastman, at the township of King aforesaid, on the 7th day of September, 1847, (the summons upon which this conviction takes place having been issued on the 16th day of December, 1847) entered upon the close of the said Joel Rogers, situated in the township of King aforesaid, and then and there he, the said Jonathan Eastman, did wilfully damage and spoil, and take and carry away, certain goods and chattels of the said Joel Rogers, then and there being, to wit, six bushels of apples, and thereby he, the said Jonathan Eastman, did wilfully commit an injury to the said goods and chattels of the said Joel Rogers; and I, the said William Reid, adjudge the said Jonathan Eastman, for his said offence, to forfeit and pay to the said Joel Rogers the sum of nine shillings, for the injury and damage aforesaid, and also to pay the sum of two pounds twelve shillings and nine pence

for costs, and I order that the said sums shall be paid by the said Jonathan Eastman, on or before the 24th day of January now next ensuing, and I direct that the said sum of nine shillings, and also the said sum of two pounds twelve shillings and nine pence costs shall be paid to the said Joel Rogers.

"Given under my hand and seal, the day and year first above written.

"W. REID, J. P." (L. S.)

The warrant ran as follows:—

"Home District to wit.—To the constable for the township of Gwillimbury East, in said district.

"Whereas judgment was given against Jonathan Eastman, of the township of King, in the said district, in a suit Rogers v. Eastman, for a misdemeanor in taking apples by force and violence off and from the premises of said Joel Rogers, and having appealed to the quarterly sessions in April, which was set aside.

"These are therefore to authorize you to seize of the goods and chattels of the said Jonathan Eastman, and to make sale thereof, so as to make the amount of 2*l.* 11*s.* 6*d.* currency, with your reasonable costs thereon, by giving not less than eight day's notice, published in not less than three different public places, of the time and day of sale, unless the said sum shall be sooner paid, and sale is effected; the balance if any to be paid to said Eastman, upon demand.

"Given under my hand and seal, this April, 1848.

"J. REID, J. P." (L. S.)

A verdict was entered for the defendant at the trial, subject to the points reserved, as to the sufficiency of the conviction and warrant. The plaintiff moved in term to enter the verdict in his favour.

The judge below discharged the rule, holding that the conviction and warrant were sufficient in point of form, and that he was precluded from looking at the transaction other than as it appeared on the face of the conviction and warrant.

From this decision the plaintiff appealed.

Ewart for the appeal. *Burns* contra. The authorities cited were—4 & 5 Vic. ch. 24, 25, 26, 34, 37; 1 D. & L. 726; 1 M. G. & Scott, 209; 5 Burr. 2684; 5 D. & R. 268; 2 Bing. 483; 2 N. & M. 376; 1 D. & R. 222; 1 Ch. Cr. Law, 816; Com. Dig. Distress, A.; 8 Co. 51 (a).

ROBINSON, C. J., delivered the judgment of the court.

In order to shew a good justification, it was necessary that the defendant should give in evidence a conviction not illegal on the face of it, and a warrant of distress supported by that conviction, and not on the face of it an illegal warrant.

This warrant I take to be on the face of it bad; it is described as having been made in a suit between party and party, and for a *misdemeanor*, in taking apples by force from the premises of the person whom we must infer to have been the plaintiff, and this is not said to have been done against any statute; so that for all that appears in the warrant, the defendant may have assumed summary jurisdiction in a civil action of trespass for taking apples, except indeed that the word *misdemeanor* is used, which alone would indicate it to be a criminal proceeding, and which is repugnant to the recital in the warrant of its being in a *suit of Rogers v. Eastman*.

Then 2ndly, if there could be any legal conviction, such as this warrant recites, it was necessary to shew it, and none such is shewn, for the conviction is for wilfully damaging and spoiling and taking and carrying away six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels of the said Rogers.

If this conviction could be supported at all, it could only be under the 21st or 24th clause of 4 & 5 Vic. ch. 26, or under the 34th clause of 4 & 5 Vic. ch. 25; but though the act done by the defendant may have been in truth such as would warrant a conviction under one or other of these clauses, yet the conviction does not state what could be an offence under either of these statutes, nor any offence which under any statute pointed out to us would authorise such a conviction.

The conviction is not for stealing apples, nor does it appear that the apples were growing on a tree at the time; they may for all that appears have been taken out of a box or a bin, on the prosecutor's premises, and in such a manner as to be a mere civil trespass. The conviction does not support the warrant, and neither the one nor the other contains a statement of an offence for which such a conviction could take place. It is therefore not necessary to consider whether the justice had any authority to issue a distress warrant in case the conviction had been legal.

The judge of the district court was quite right in declining to go into any consideration of the merits upon the evidence before the magistrate, though we have no doubt that that evidence did shew a case in which there should not have been a conviction; but the defendant is not relieved from the necessity of shewing a conviction good on the face of it.

The order of the court that judgment be entered for the plaintiff on the points reserved must be reversed, and judgment entered for the defendant.

Per Cur.—Judgment below reversed.

SHERWOOD AND JONES V. COLEMAN.

Ship Registry Act, 8 Vic. chap. 5, secs. 2, 7, 13—Sufficiency of recital of certificate of registry in a transfer of vessel by way of mortgage.

Held per Cur., that the following recital of a certificate of registry of ownership of a vessel, contained in an indenture of sale by way of mortgage of such vessel—the schooner “James Coleman, of Dundas, and duly registered according to the statute in such case made and provided, and the certificate of ownership of which is granted to the said William Colcleugh, whereby it is certified that the said vessel was registered at the Custom House at the port of Hamilton, the 8th day of April, 1847, and is of the burthen of 232⁷⁰/₁₀₀, and which said certificate is under the hand of John Davidson, the collector of and for the said port of Hamilton, as by reference to the said certificate will fully appear”—was not a sufficient compliance with our Provincial Ship Registry Act, 8 Vic. ch. 5, secs. 2, 7, 13, and that therefore the indenture of sale was void.

The recital was held insufficient, in giving the tonnage alone of the vessel, which could not be said, within the terms of the 13th section of the act, to be such a description of the vessel as to shew the identity of the vessel transferred, with that described in the certificate of registry.

Trover for a schooner called the James Coleman.

Plea: 1st. Not guilty.

2nd. That plaintiffs were not possessed, &c.

Verdict for plaintiff 1055*l*.

The plaintiffs proved that on the 10th July, 1848, William

Colcleugh, by deed, executed by him of the one part and plaintiffs of the other, recited that in consideration that they had indorsed certain papers bearing even date with this indenture, for him and one Grier, to the amount together of 1000*l.*, payable in three months; and in order to secure them from any liability therefrom, he sold, assigned and transferred to plaintiffs, the schooner "James Coleman, of Dundas, and duly registered according to the statute in such case made and provided, and the certificate of ownership of which is granted to the said William Colcleugh, whereby it is certified that the said vessel was registered at the custom house in the port of Hamilton, the 8th day of April, 1847, and is of the burthen of 232 tons and $\frac{70}{100}$; and which said certificates, under the hand of John Davidson, the collector of and for the said port of Hamilton, as by reference to the said certificate will fully appear," together with all and singular the rigging, &c., to have and hold the said vessel to the said H. Sherwood and E Jones, to their own joint and separate use and behoof forever.

The deed contains a proviso, that if Colcleugh and Grier should pay the amount of these papers, so indorsed by these plaintiffs, at the time of its becoming payable, so that the plaintiffs should be kept harmless, then the assignment should be void; but that until default in paying some part of the money, Colcleugh should remain in possession of the vessel, for his own use. And further, that if default should be made on any of the papers so indorsed, then the plaintiffs might immediately thereafter take possession of the vessel, and sell and dispose of the same, in order to raise the money which they might be liable to pay.

It was not denied at the trial, that there was default by Colcleugh and Grier in paying the notes; they became bankrupts in December following.

In November, Colcleugh put her into possession of this defendant, who refused to give up the vessel to this plaintiff upon a formal demand made in January following.

A verdict was rendered for the plaintiffs, 1055*l.* damages.

McDonald obtained a rule to set aside the verdict, as being contrary to the law and evidence. *Phillpotts* shewed cause.

The objection relied upon as the ground of the rule, was that the same necessity existed under our Ship Registry Act, 8 Vic. ch. 5, for inserting in an assignment by way of mortgage a recital of the certificate of registry, as for inserting it in a deed made upon an absolute sale; and that the recital contained in the mortgage to these plaintiffs is insufficient, not containing sufficient to identify the vessel.

The authorities cited were—8 Vic. ch. 5, secs. 1, 2, 7, 13; 2 Evans' Stat. 22; 2 B. & Al. 427; 26 Geo. III. ch. 60, sec. 16; 34 Geo. III. ch. 68, secs. 14, 15, 16; 4 Geo. IV. ch. 41, sec. 29; 6 Geo. IV. ch. 110; 3 & 4 Will. IV. ch. 55; 3 T. R. 406; 8 E. R. 231; 4 M. G. & Sc. 121; Abbott on Ship, 28, 84; 5 Taunt. 641; 7 T. R. 906; 4 C. B. R. 122.

ROBINSON, C. J., delivered the judgment of the court.

In the case of Watkins et al. v. Corbett, determined in this court last term, we decided that an assignment by way of mortgage must contain a recital of the certificate of ownership, as well as a deed made upon an absolute sale. The only question then open to consideration in this case is, whether the recital contained in this assignment is sufficient. Its terms have been stated. The registered certificate itself is as follows: "The ship or vessel called the James Coleman, of Dundas, which is of the burthen of 272 tons and $\frac{32}{100}$, and whereof John Kemp is master; and that the said ship or vessel was built at Dundas, in the year 1846, and purchased from James Coleman, of Dundas; and William Irving, surveyor of customs, having certified to me that the said ship or vessel has one deck and two masts; that her length, from the inner part of the main stem to the fore-part of the stem post aloft, is 117 feet and $\frac{2}{10}$; her breadth in midships is 23 feet and $\frac{2}{10}$, her breadth in hold in midships is 10 feet; that she is schooner rigged with a standing bowsprit; is square stemmed, corvet built, has no galleries, and has no figure head. And the subscribing owner has consented and agreed to the above description; and his ownership or property in the said ship or vessel, called the James Coleman, of Dundas, has been duly registered at the port of Hamilton.

"Certified under my hand, at, &c."

It will be seen that the certificate of ownership granted in this case to Coleleugh, as the owner of the vessel James Coleman, closely conforms to the forms given in our statute 8 Vic. ch. 5, containing all the requisite particulars, not only of the vessel's tonnage, but of the number of her decks and masts, length from stem to stem, greatest breadth, depth of hold, description of rigging, &c.; and that the recital of the certificate in this mortgage specifies none of these particulars last mentioned, but only sets out that the certificate "declared that the James Coleman was registered at the custom house at the port of Hamilton, on the 8th day of April, 1847, and is of the burthen of 232 tons and $\frac{70}{100}$; and that the certificate to which it refers was under the hand of John Davidson, collector for the port of Hamilton."

Now, whether this recites enough of the certificate to make the transfer which contains it valid, is the question which we have to determine; and this depends on the view to be taken of the 2nd, 7th and 13th clauses of the act.

We have come reluctantly to the conclusion that we cannot hold the recital contained in the deed to the plaintiffs to be a sufficient compliance with the statute. The second clause of the act requires that the form of the certificate of registry of ownership shall be such as that clause contains, and in this are specified the build, the class, the tonnage, the dimensions and the rigging.

The legislature must be supposed, then, to have looked upon these as being all material parts of the description. If the 13th clause, instead of being in its present form, had without any qualification required that each subsequent assignment should contain a recital of the certificate of ownership, then the omission of any of the particulars in such recital, or the accidental misrecital of them, would be clearly a non-compliance with the direction of the act, and would occasion difficulty. Such difficulties were found to occur.

In *Westerdell v. Dale*, 7 T. R. 311, Lord Kenyon, in giving judgment in a case of that kind, recited the clause in the English Ship Registry Act then in force, 26 Geo. III. ch. 60,

sec. 17, which required that in every bill of sale of a ship the certificate of registry should be truly and accurately recited in words at length, otherwise such bill of sale shall be utterly null and void, to all intents and purposes; and he remarked, "cases had arisen in the construction of that act of parliament that distressed our feelings. In one instance (*Rolleston v. Smith*, 4 T. R. 161) we relaxed a little from the strict words of the act, in deciding that a mere clerical error could not vitiate the bill of sale, the certificate being in effect the same, and the error being apparent in the instrument itself." But he observed, that in the case then before them there was scarcely any similitude, so that they could not say that the certificate was truly recited; and then it follows that this is not a legal transfer of the ship. "If any inconvenience," his lordship said, "has resulted to the public from this regulation in the act, and if it be expedient to relax from the words of the act in this respect, application must be made to the legislature for that purpose, and not to a court of law."

Instances having multiplied, probably, in which transfers had been defeated by small errors in reciting the certificate, the later British statutes have relaxed in this respect, and the 3 and 4 Will. IV. ch. 58, sec. 31, while it required the certificate to be recited, or the *principal contents thereof*, provided that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate instead of the existing certificate, "*provided the identity of the ship or vessel intended in the recital be effectually proved thereby.*"

Our statute 8 Vic. ch. 5, sec. 13, precisely follows this provision. It dispenses with a literal recital of the certificate, but requires that at least the principal contents thereof shall be recited. It is rather an unpleasant and difficult duty thrown upon courts of justice, to determine under such an enactment what are the principal contents of the certificate which must be inserted, and what part of the description may be safely omitted as not forming a part of the principal contents.

There is no question here about errors in the recital, for

there are no such errors; the recital, so far as it goes, is correct. The latter part of the clause therefore, respecting *errors*, is inapplicable. The question is only whether enough of the certificate has been recited in this case, and the reasonable criterion is that given in the last words of the clause. Can we say truly that, notwithstanding the omission of almost every part of the description of the vessel, the identity of the vessel transferred, with that described in the certificate, is effectually proved? We think we cannot say so; for the only part of the description recited is the tonnage, 232 tons and $\frac{70}{100}$.

It is most unlikely that upon any second measurement of the vessel, by another person, the tonnage would be made the same to a hundredth part; and if it should not be, then that single item of the description would disprove the identity, instead of establishing it. But admitting that upon every measurement the tonnage would be sure to be brought out exactly the same, we surely cannot venture to say that every other specification in the certificate may be omitted, and that it shall be sufficient if the recital gives the tonnage alone. And yet such would be the effect of our upholding this bill of sale; and all else that the legislature has required shall be inserted in the certificate would be thenceforward rendered useless.

No person, reading all that is recited of the certificate in this bill of sale, could tell whether the vessel it related to was a steamboat or a sailing vessel, whether she had three masts or one, or indeed carried any mast at all. She is called a schooner in the bill of sale itself, but we are not told what she is described to be in the certificate; and from reading all that is said in the recital, no idea whatever could be formed of the kind of vessel to which it relates.

Now the 7th clause of our act shews clearly that the intention of the legislature was to enable all officers of the customs, on examination of the assignment and comparing it with the ship herself, to "*discover whether she is the same with that for which the certificate of ownership is alleged to have been granted.*" And it need hardly be said, that a recital of a certificate which contains no information

in regard to the length, breadth, depth, build, or class of vessel, must be wholly useless for that purpose.

It is true that the bill of sale states when, where, and by whom the certificate of registry of ownership was granted, and that supplies means of inquiry, by reference to the registry itself or the certificate; but the object is to afford evidence of identity, so far as can be done upon the spot, that it may accompany the vessel and shew her to be entitled to the privileges which she claims.

Whether it was expedient or not to embarrass the trade of our inland waters by introducing regulations which had before been confined to sea-going vessels, was for the consideration of the legislature; we have no discretion, but must carry the enactment into effect.

In the case of *Rolleston v. Hibbert*, 3 T. R. 406, where a question of a similar kind arose upon the Ship Registry Act, Mr. Justice Buller felt himself compelled to say: "In this case the defendants have undoubtedly acted fairly and *bona fide*; and if they lose the benefit of that security to which they trusted, it is certainly a hard case. But the doctrine of hardship is not a favorable subject in a court of law in any case, still less so when we are to judge according to the spirit and words of an act of parliament."

I regret in this case the effect of our decision; but we have no authority to deviate so widely from the language and evident intention of the statute, as we must do if we were to rule this recital to be sufficient.

I will only add, that this re-examination of the law respecting ship registry has left no doubt whatever in our minds that we were right in holding, as we did in *Watkins et al. v. Corbett*, that the 13th clause of our act must be taken to apply as well to assignments by way of security as to absolute sales.—8 E. R. 231.

We are of opinion that the rule must be made absolute.

Per Cur.—Rule absolute.

PRACTICE COURT.

Before the HON. MR. JUSTICE DRAPER.

MICHAELMAS TERM, 1849.

DOE REES V. DICK.

Judgment as in case of a nonsuit.

Rule for judgment as in case of a nonsuit discharged without costs, the plaintiff having been led by the defendant to rely upon him for the procurement of some material documentary evidence in the cause, and for which the defendant subsequently, and after the record had been entered, determined not to send.

Irving moved for judgment, as in case of nonsuit, on the usual affidavit that issue was joined and notice of trial given for the last assizes for the Home District, and that plaintiff did not proceed to trial, or countermand the notice in due time.

Gwynne shewed cause on affidavit; setting out, among other things, that the subject matter in dispute required evidence from the Crown Lands Department: that it was arranged between himself and defendant's attorney that the latter (who stated he wanted evidence also from the said office) should send down a messenger, who would also bring up what documentary proof the plaintiff required: that subsequently the defendant's attorney determined on not sending for any such evidence, but the plaintiff's attorney was not aware of this until many days after the record had been entered: that in consequence of this, and of the impossibility afterwards of getting papers, owing to the removal of the Crown Lands Department to Toronto, which was in progress during the assizes, he did not go to trial.

Irving complained that the plaintiff put the defendant to unnecessary expense in delaying to withdraw the record to the last day; whereas, had he withdrawn as soon as he found he could not get the evidence he wanted, the defendant might have sent home his witnesses.

DRAPER, J.—Considering the circumstances, I think this rule should be discharged without costs, on the plaintiff's entering into the peremptory undertaking.

Per Cur.—Rule discharged without costs.

ROSS QUI TAM V. MEYERS, ONE, &C.

Judgment as in case of a nonsuit—Payment of costs of the day, and of application—Conditions precedent—Rule for peremptorily undertaking—By whom to be taken out, and when.

Payment of the costs of the day, and of the costs of the application for judgment as in case of a nonsuit, *may* be made a *condition precedent* to the plaintiff's being allowed to discharge the rule for judgment, and to carry down the cause for trial at the next assizes.

If no costs of the day have been incurred, that portion of the rule may be considered as surplusage; the rule need not be amended.

The rule containing the peremptory undertaking of the plaintiff to go to trial may be taken out *by the defendant* after term, though moved for *by the plaintiff* in term.

This rule may also be taken out *after* the time therein limited for the plaintiff's taking the cause down to trial.

Eccles, H., obtained a rule to shew cause why the rule containing a peremptory undertaking of plaintiff to go to trial at the last assizes for this district should not be set aside for irregularity.

1st. Because the defendant had taken it out after term, though he had not moved for it in term. 2ndly. Because it was taken out after the time therein limited for plaintiff's carrying the cause down to trial. 3rdly. Because it makes the payment of the costs of the day, and of the defendant's application for judgment as in case of nonsuit, a condition precedent to the plaintiff's carrying down the cause; and to the discharging the defendant's rule for judgment, as in case, &c.; or why the rule containing the peremptory undertaking should not be amended by striking out the condition of paying those costs.

The rule complained against issued in Trinity Term, and was as follows: Upon reading "the rule made in this cause during last (*Easter*) term, and upon the undertaking of the plaintiff to bring on the issue in this cause to be tried at the next assizes to be holden in and for the Newcastle district, and upon payment of the costs of the day, as well as the costs of this application, it is ordered that the said rule be discharged, and further time is allowed to the said plaintiff to bring on the issue to be tried pursuant to his undertaking, and the same is then peremptorily to be brought on to be tried. Upon hearing of counsel for both parties. On motion of Mr. Crooks. By the court. Dated 21st August, 1849."

This rule was served on the agent of the plaintiff's attorney on the 24th October last, having been taken out by defendant's agent on that day.

The rule nisi for judgment, as in case of nonsuit, was granted against the plaintiff, for not having proceeded to trial, pursuant to the practice of this court, on an affidavit that issue was joined as of Trinity Term, 1846: that the plaintiff had given notice of trial for the Newcastle Spring Assizes in 1849, and had countermanded such notice. It was opposed, on affidavits that the cause was brought down for trial at the Fall Assizes in 1846, and was withdrawn on the full expectation of an arrangement with defendant; which being ultimately refused, the notice for the Spring Assizes was given, and was countermanded owing to the plaintiff's being confined by a fall from his horse.

The present rule nisi was obtained on reading the foregoing rules, papers, and on affidavit establishing the facts stated.

Crooks shewed cause, on an affidavit of the defendant that, before the last assizes, he was informed by his agent, and, on enquiry, by the clerk of the Practice Court, that his (defendant's) rule was discharged on the peremptory undertaking and payment of costs: that in consequence of this information, and no costs being taxed or paid, and the rule of Trinity Term not having been taken out by plaintiff, he (defendant), though served with notice of trial for the last assizes, made no preparation for his defence, and informed the plaintiff and his counsel, before the trial, that for this reason he should not appear at the trial; and that the plaintiff proceeded and got a verdict for 2000*l.*: that defendant believes he could defend the suit successfully on the merits; and that in order to ensure his being enabled to take advantage of the rule of Trinity Term, he directed his agent to take it out, that he might move to set aside all plaintiff's proceedings subsequent to the granting of that rule, the terms thereof not being complied with.

DRAPER, J.—In disposing of this application, the court can only look at what the parties have themselves brought forward and relied on in support of or in opposition to it.

The defendant's rule for judgment, as in case of a nonsuit, in Easter Term last, was strictly within the statute 14 Geo. II. c. 17, s. 1, being founded on the plaintiff's neglect to bring the issue to trial according to the course and practice of the court. Its being a *qui tam* action makes no difference.—Stone q. t. v. Farey, 1 Ea. 554. The issue was sworn to have been joined as long ago as 1846, so that there were several defaults, the last of which was excused by the plaintiff's affidavit of an accident to himself, which prevented the cause coming on.—Walter v. Buckle, 2 Chit. R. 244; Nicholls v. Collingwood, 2 Dowl. 60.

The plaintiff was bound to give some excuse for this default, or the defendant was entitled to succeed in his motion and was not compelled to accept a peremptory undertaking; and the court, I apprehend, had the power to superadd, as a condition, that the plaintiff should pay the costs of the application.—See Coombe v. Moore, 8 Price, 94. The words in the statute, “unless upon just cause and *reasonable terms* they shall allow a further time for the trial of such issue.”

The practice of our court has differed from that of the courts in England, in regard to this matter.—Hil. 2 Will. IV. No. 69; 3 B. & Ad. 383. There they have a rule that the court, on discharging a rule for judgment as in case of a non-suit, may order the plaintiff to pay the costs of not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule. A contrary practice has long prevailed in this court; and it is usual to make the payment of the costs of the day, and of the application—Benhaven v. Shaw, 1 Draper's Rep. 121; Bergin v. Whitehead, 1 Draper's Rep. 520—a condition to the plaintiff's being permitted to enter into the peremptory undertaking, though special circumstances may create an exception—Doe Anderson v. Todd, 1 Cameron's Rep. 279—and induce the court to allow the plaintiff to enter into the peremptory undertaking without paying costs. While, on the other hand, it has been ordered that the rule for judgment as in case of a nonsuit should be absolute, unless the costs of the day were paid by a fixed time.—Penneman v.

Wince, Mich. 6 Will. IV. M. S. Rep. Draper; Warren v. Grant, Easter, 2 Vic.

Such being the established practice here, there is no reason to doubt that if the default complained of in this case had been the not proceeding to trial pursuant to notice, the rule would have been granted precisely in the form in which it now is. But the default being the not going to trial for more than two assizes after issue joined, and no costs of the day having been incurred, or at least none being shewn to have accrued, there is a condition inserted in the rule inapplicable to the circumstances, and which must be considered the error of the officer of the court and inoperative on the plaintiff's future proceedings.

On the other hand, the granting the costs of the application was in accordance with the ordinary practice of this court, and was thus made a condition precedent, to the plaintiff's discharge of the rule for judgment as in case of a nonsuit. I see no necessity for granting the latter alternative prayed for on this motion, viz., amending the rule; because, as to the costs of the day, it is simply inoperative, and as to the costs of the application, the giving them is in accordance with the usual practice.

Then as to setting aside the rule containing the peremptory undertaking for irregularity, there are three grounds of objection. 1st. That it was taken out by defendant after term, as on motion made on his behalf; no such motion having been made during term. The rule simply says, "on motion of Mr. Crooks," not saying of counsel for plaintiff or defendant; and there is no affidavit, shewing in fact on whose behalf he did move. According to several cases, some of which are important in another respect, the rule containing the peremptory undertaking may be drawn up by either party; and though generally drawn up by the plaintiff, the defendant may draw it up if he wishes to act upon it.—Gingell v. Been, 1 M. & Gr. 50 and 555; Sawyer v. Thompson, 9 M. & W. 248; Knight v. Smith, 1 D. & L. 912. These cases also establish that, in the Exchequer and Common Pleas, the defendant *must* take out the rule for the peremptory undertaking within the time to which that

undertaking relates, so as to give the plaintiff sufficiently early notice that the defendant means to hold him to his undertaking to enable the plaintiff to fulfil it. And for an omission to do this, the court set aside the rule absolute for judgment as in case of nonsuit, which had been obtained on affidavit of the plaintiff's neglect to comply with the peremptory undertaking.—*Landrells v. Ball*, 11 Jur. 1038 ; 5 D. & L. 62. But in a later case it was held, after referring to the cases just cited, that, according to the practice in the Queen's Bench, the plaintiff was bound to draw up and to take notice of a rule discharging a rule for judgment as in case of nonsuit on a peremptory undertaking, at his own peril, and that it is not necessary for the defendant to draw up the rule. This latter decision appears to me, at all events under the practice of this court, more reasonable than those in the courts of Common Pleas and Exchequer. For the permission to enter into the peremptory undertaking is granted for the relief of the plaintiff, on his application, "upon *just cause*" shewn by affidavit and upon "reasonable terms" imposed in this court, as a condition to his obtaining the indulgence. And I think, therefore, that although the defendant may take out the rule at any time, with a view to ulterior proceedings on the plaintiff's default, it is not incumbent on him to do so at any *particular time*, as a step necessary to fix the plaintiff, and to entitle himself to make the rule for judgment as in case of nonsuit absolute on plaintiff's default.

I think the first objection fails, because the defendant had a right to take out this rule, to enable him to take advantage of the plaintiff's default, if he committed any.

The second objection was, that the rule was taken out after the time therein limited for the plaintiff's taking the cause down to trial. For the reason already given, and on the authority of *Landrells v. Ball*, I think this cannot prevail.

And on the last objection, as to the payment of the costs of the day, and of the defendant's application for judgment as in case of nonsuit being *improperly* made a condition precedent to the plaintiff's carrying down the cause to trial, I have already stated the grounds of my opinion, and think

that the direction to pay the costs of the day is merely *vitium clerici* and inoperative; and as to the costs of the application, our practice recognizes their payment as a proper condition, and it is not shewn that such condition was not imposed by the court on discharging the defendant's rule for judgment as in case of nonsuit. I think, therefore, this rule should be discharged.

Per Cur.—Rule discharged.

COMMERCIAL BANK V. G. S. BOULTON.

Setting aside writ of fi. fa. sued out by assignee of judgment in the name of the assignor.

A. obtains judgment against B. on his bond, and after this assigns the judgment to C., for a valuable consideration; C. issues a writ against B's lands, in the name of A.; B. applies to set the writ aside. The Court discharged the application.

This was a rule obtained to set aside writs against the lands of the defendant, on the ground that the judgment was founded on a bond given by the defendant jointly with one Donald Bethune, conditioned to pay a sum not exceeding 1000*l.*, if so much should be found due to the plaintiffs by Bethune, on a half-yearly balance of their running accounts. A balance became in arrear and unpaid by Bethune to the plaintiffs, whereupon they brought their action against the defendant on his bond, and recovered judgment. After this, and while a balance of 2728*l.* 17*s.* 9*d.* was still due from Bethune to the plaintiffs on the account, to secure 1000*l.* of which defendant's bond was given, the plaintiff's assigned this judgment with the other securities they held for Bethune's debt, to the Bank of Upper Canada, receiving as the consideration for such assignment the sum of 2728*l.* 17*s.* 9*d.*, and the assignees of the judgment issued the writs moved against, to enforce payment by defendant.

It was contended that the plaintiffs had been paid the full amount of the debt due to them by Bethune, the principal, and that they could not *now* enforce the judgment against the defendant, who was surety.

DRAPER, J.—On the statement of these facts it appears, that neither Bethune nor the defendant have ever paid anything, and the receipt from third parties of the consideration

for the *assignment* of their securities, and of this judgment among others, cannot amount to a satisfaction by the debtor, and so to an extinguishment of the claim against them. Nothing appears to distinguish this from a common case of assignment of a judgment enforced by the assignee, and of necessity in the name of the original plaintiff.

Per Cur.—Rule discharged.

SHIELDS V. DAVIS.

Interpleader Act—Making up the issue—Order of Court thereupon.

Where no time has been limited by an interpleader order for the plaintiff to make up the issue between the parties, the court will order the issue to be made up by the claimants on or before a certain day, or on default thereof to be barred from prosecuting the claim.

An interpleader order had been granted in this case, in which no time was limited for the plaintiff to make up the issue between the parties. *The court*, on motion of *Leith*, and after hearing *Eccles* on the other side, make absolute a rule ordering the claimants to make up the issue on or before the 23rd of December next, or in default thereof, to be barred from prosecuting the claim.

GILLESPIE ET AL. V. NICKERSON.

Insolvent debtor—Discharge.

A prisoner in execution for debt, cannot, by assigning his effects in trust for such creditors as choose to come in, and on receiving a dividend, give him an absolute discharge, make himself an insolvent debtor within the terms of the statute 10 & 11 Vic. ch. 15.

The defendant applied to be discharged, under the stat. 10 & 11 Vic. ch. 15, as an insolvent debtor.

Interrogatories were administered to him, in reply to which he swore, that on the 30th of April last he assigned all his debts, promissory notes and securities, to a trustee for the benefit of his several creditors, amongst others the plaintiffs, to pay the proceeds in proportion; that he had caused information to be given to the plaintiffs, that he would assign over all he was possessed of, provided the creditors would discharge him on making such assignment, but that plaintiffs refused to accede to this proposal, and that he had no means of paying this claim except from the debt so assigned. He further stated, that he contracted this

debt in May and June, 1848, and that in October, 1848, he, sold all his then stock on hand to one Samuel Froste, for 330*l.* 10*s.*, taking his notes therefor, at twelve, eighteen and twenty-four months.

DRAPER, J.—I think this application must be refused. A person in execution for debt, cannot by assigning his effects in trust for such creditors as choose to come in, and on receiving a dividend give him an absolute discharge, make himself an insolvent within the intent and spirit of this act.

The assets in the hands of the trustee are still for all that appears the defendant's property; he retains such an interest in the application of the proceeds, as in my opinion to disentitle him to relief under the act. If it were otherwise, the act might very easily be converted into the instrument of gross fraud.

Per Cur.—Application refused.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE.

QUEEN'S BENCH AND PRACTICE COURTS,

FROM MICHAELMAS TERM, 12 VICTORIA, TO TRINITY TERM, 13 VICTORIA,
INCLUSIVE.

ABSCONDING DEBTOR.

Proceedings under the act by the creditor of an absconding debtor against his debtor. What averments necessary in the declaration.] The creditor can only have a verdict for so much of the debt due to the absconding debtor as will cover his own debt against the absconding debtor.—*Thompson v. Farr*, 387.

ACCORD & SATISFACTION.

Pleadings. Accord and satisfaction, what amounts to.] Goods, agreed to be accepted in satisfaction and discharge of the causes of action in the declaration, and of all damages, &c., must be actually delivered—their readiness to deliver will not do.

Semble, that a plaintiff may, after breach of the promise stated in the declaration, legally agree to take a contract, or new agreement to deliver goods, &c., in full satisfaction of the former promises, and of the damages accruing from the breach of them.—*Thomas v. Mallory*, 521.

Where an action is for a tort, and the damages in the discretion of the jury—*Semble*, that a promissory note may be taken in satisfaction; the principle that a less sum of money cannot be taken in satisfaction for a greater, not applying in such a case.—*Lane v. Kingsmill*, 579.

ACTION.

Gas Company of Toronto, Liability of stockholders, in an action of debt, under 11 Vic., ch. 14, to pay calls made by the secretary of the company in pursuance merely of a resolution adopted by the directors before the passing of the act.] The Gas Company of Toronto sued stockholders A. B. C. D., in separate actions of debt, *founded upon the Statute 11 Vic., ch. 14*. This statute related to such actions only as might be brought for the recovery of money, which "should from time to time be called for by the Directors of the said Company (that is, of the Company incorporated by the statute), *under and by virtue of the powers and directions of that act*." It was proved in evidence at the trial, that the *secretary* of the company acting under a resolution merely of the directors, passed *before* the statute 11 Vic., ch. 14, came into force, notified the stockholders that a call of 10 per cent. would be made on the first May, June, July and August.—*Held per Cur.*, that as upon this evidence these calls could not be said to be "*made by the directors of the company acting under and by virtue of the power and direction of that act*", the company could not sustain their action upon the statute.

Semble, That it is not a resolution of the directors, to make a call upon the stockholders which constitutes the *call*—but the notice or advertisement of the call itself.

Semble, That when an act says, “that no instalment shall be called for, except *after* the lapse of one callendar month from the time when the last instalment was called for,” calls made for 1st May, June, July and August, would be illegally made.

Quere also, whether the four calls could regularly be made at one time.—Gas Company v. Russell et al. 567.

ADMINISTRATOR DE BONIS NON.

A promise of debt to a third party, enuring to benefit of administrator de bonis non.] An express promise to pay, made by the defendant to a third party, a stranger, may enure to the benefit of the plaintiff, an administrator de bonis non, with the will annexed, though at the time of such promise, the plaintiff had not obtained letters of administration.—Beard Adm. v. Ketchum, 470.—(See this same case reported in 4 U. C. R. 114.)

AFFIDAVIT.

Sworn before partner of defendants' attorney. *New trial*.] A new trial was moved by the defendants on an affidavit sworn before a partner of the defendants' attorney.

Held per Cur., on an exception being taken, when shewing cause, that the rule must, on that ground, be discharged.—White v. Petch & Manning, 13.

Affidavit to arrest on special case. Form of. Judge's order.

Issuing of writ.] The affidavit to arrest in special case, requiring the sanction of a judge to the issuing of the writ, need not follow the form prescribed by the act; that form of affidavit being only considered necessary in matters of debt, where the creditor may sue out the *capias* as of right.—Neven v. Butchart, 196.

AGENT. See “Arrest.” ALIEN.

Seven years' residence of a parent (a foreigner) in this province—right of son to inherit—statutes Geo. IV., ch. 21, 4 & 5 Vic., ch. 7, 7 Vic. ch. 43.—Doe Chandler v. Tesseir, 216.

AMENDMENT.

Venire. Record.] An irregularity in the award of venire upon the record is amendable by the court.—Whitelaw v. Davidson, 534.

Jurata. Record.] *Held, per Cur.*, that the Nisi Prius record not having been altered after a new trial granted, but the entry being allowed to continue, as before, of the jury being respited to the term next following the preceding assizes, the defect could not be cured by amendment. The decision in this court on that point of Doe Crooks v. Cummings was adhered to.—Smith v. Shaver, 20.

Where the defendant set up a deed as made between A. B. of the one part, and the Bank of British North America of the other, and when produced at the trial it turned out to be a deed made between A. B. and Mr. Thomas Paton, who was afterwards stated in the body of the instrument to be the inspector of the bank; *Held, per Cur.* that,

the variance was fatal, and could not be amended.—*Bank of B. N. A. v. Sherwood*, 532.

APPEAL.

Appeal from District Court on special points of demurrer.] *Sem- ble*, that upon appeals to this court from the District Courts on points of special demurrer, it does not follow that effect will be given to all objections which would be allowed to prevail in this court.—*Outwater v. Dafoe*, 256.

ARBITRATOR.

Power of respecting testimony offered.] Arbitrators refusing to give time to produce testimony, will not be allowed to support their award by shewing that such testimony could have been of no service.—*In re Bull v. Bull*, 388.

Power of.] As to the power of arbitrators, under a very general submission, to cancel an existing partnership agreement, and to award prospective damages to the partner losing by such cancellation.—*Crouse v. Parke*, 362.

ARREST.

Agent for creditor making affidavit to arrest on ca. sa.—his liability therefor. Setting aside verdict for the plaintiff.] An agent of a creditor making an affidavit, upon which the debtor is arrested on a *ca. sa.*, is liable to an action on the case—for causing the writ to be sued out, and to be endorsed and delivered to the sheriff, and the debtor to be arrested thereupon—though the jury expressly find, upon that point being submitted to them, that the agent did nothing more than make the affidavit.

Though the court may think that under the facts proved, in an action on the case for a malicious

arrest, a verdict for the defendant would have been more proper than for the plaintiff, yet, if no clear or precise ground has been shewn by the defendant for the suspicion sworn to in his affidavit, and there has been no misdirection on the part of the learned judge at the trial, they will not set aside the verdict.—*Davis v. Fortune*, 281.

In an action for a malicious arrest on a *ca. sa.*, when there was no cause for believing that the plaintiff had made any secret or fraudulent conveyance of his property, in order to prevent its being taken in execution, the question to be submitted is, not whether an assignment of the property really is fraudulent or not, but whether the defendant has reason to suspect that it is so.—*Gunn v. McDonald*, 596.

Where it was averred in the declaration against a defendant for a malicious arrest, that by virtue of the affidavit of the defendant, he, the defendant, maliciously caused a writ to be sued out for arresting the plaintiff, when he had no probable cause for believing that the plaintiff had made any fraudulent conveyance of his property, and that he further maliciously caused the writ to be endorsed and delivered to the sheriff, &c.; *Held, per Cur.*, that these facts if found by a jury, constituted in themselves the agency of the defendant for the plaintiff in the suit, and that the agency need not otherwise be more positively averred.—*Davis v. Fortune*, 597.

Pleadings. Averments denying want of probable cause of arrest.] Case for the malicious arrest of the plaintiff on a *ca. re.* The plaintiff averred in his declaration, "that the defendant, not having any reasonable cause for

believing, and not believing that plaintiff was then immediately about to leave that part of the province of Canada formerly called Upper Canada, with intent and design to defraud the Bank of British North America (the plaintiffs), &c., made oath, &c., that he had good reason to believe, and did verily believe, that the plaintiff was then immediately about to leave Upper Canada, with intent, &c." *Held, per Cur.*, on a motion for an arrest of judgment, because these averments did not deny the want of probable cause for the arrest, and in such terms as the statute 8 Vic. ch. 48 makes necessary—declaration good.

In an action for malicious arrest under a *ca. re.*, the plaintiff gave general evidence of his solvency, &c., no malice was proved on the part of the defendant, the defendant, however, gave no evidence to shew upon what grounds he had arrested, and the jury found the nominal damages of 1s. for the plaintiff, a rule was obtained for a new trial on the evidence, but under the circumstances, the court discharged the rule. — *Lyons v. Kelly*, 278.

ASSIGNEE.

Liability of assignee of assignee of a lease.] A lessee assigns his interest, and the assignee neglecting to pay rent and to keep the premises in repair, the lessee is sued by the lessor, who, upon being compelled to pay the rent and damages, sues the assignee of the assignee in a special action on the case for the damages he had sustained; *Held, per Cur.*, that the lessee had a good right of action on the case against the assignee, for the rent and damages he had been obliged to pay the lessor. — *Ashford v. Hack*, 541.

Assignee of Judgment.] A. obtains judgment against B. on his bond, and after this, assigns the judgment to C. for a valuable consideration—C. issues a writ against B.'s lands in the name of A.—B. applies to set the writ aside. The court discharged the application. — *Commercial Bank v. Boulton*, 6.

See *Gamble v. Rees*, 396, under "Covenant."

APPORTIONMENT OF RENT.

Pleadings. Covenant. Debt.

Apportionment of rent.] In an action of covenant between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent as in debt. — *Shuttleworth v. Shaw et al.*, 539.

ATTACHMENT.

Attachment—is it in the nature of mesne or final process? Pleadings.] *Semble*, that if an attachment for contempt in not paying moneys is to be regarded as mesne process, it should be averred in the declaration for an escape, that the sheriff had not the party in court to answer the exigency of the writ. The averment merely, that on the return day of the writ the sheriff allowed the party to go at large, will not do. And if the attachment is to be regarded as an execution, *Semble*, it then requires something in the nature of a judgment to support it. The merely averring, that the plaintiff sued out an attachment for contempt, without stating what the contempt consisted in, nor by what authority it had been determined the party was guilty of a contempt, is insufficient. A good legal foundation for the attachment must be shewn in the record. — *Lane v. Kingsmill*, 579.

ATTORNEY.

Suing out process by another attorney. Endorsing process in his own name.] An attorney may sue out process by another attorney but may sign the usual notices endorsed on the process in his own name.—*Cameron v. Wheeler*, 355.

Settling with plaintiff after fi. fa. put in sheriff's hands.] Where the defendant, an attorney, settled with the plaintiff after a *fi. fa.* had been put in the sheriff's hands, which the defendant must have known the plaintiff's attorney had issued almost wholly for the recovery of his costs, the court ordered the amount of the plaintiff's attorney's costs included in the execution, to be referred to the master to be taxed, and the defendant to pay the same to the plaintiff's attorney, together with the costs of the application.—*Griggs v. Meyers*, 532.

Power of the court to prevent attorneys pleading unjustly the Statute of Limitations to actions for moneys received for clients.]—*Semble*, that the court has authority to prevent an attorney pleading the Statute of Limitations to defeat a client's just claim, but that this power does not extend to his executors.—*Dougall v. Executors of Cline*, 546.

Action by sheriff against plaintiff's attorney for poundage.] No action lies by the sheriff against the plaintiff's attorney, to claim poundage upon an execution which the attorney had placed in his hands to be executed. *Corbett v. McKenzie*, 605.

AWARD.

Commissioners of public works. Cornwall Canal. Arbitration. Setting aside award.] In dealing

with awards made under the provincial acts 9 Vic., ch. 37, sec. 24, and 10 and 11 Vic., ch. 24, sec. 3, the court will be governed by the ordinary rules of law as applicable to awards made between party and party.

Under the two acts above mentioned a submission by the governor in council to arbitration, is a submission in effect by the commissioners of public works.

The award made by the arbitrators appointed under the above acts, stated that they awarded that the commissioners of public works should pay to A. the sum of, &c., "for the damage done to his property in the village of Miles Roches by the construction of the Cornwall Canal. No further particulars of damages were stated in the award. Affidavits, however, were filed by the engineers of the public works to shew that, in their belief, the sum awarded must have been given, from its amount, for consequential and not direct damage, such as the commissioners contended the arbitrators could alone award upon. But, *Held, per Cur.*, that the affidavits nowhere stating in positive terms, that the commissioners had allowed for consequential damages, and the award being silent on the subject, as it might be, the court could not assume the fact to be so, and upon that ground (if a valid one) set aside the award.

Quære, — Have the arbitrators the power, under the acts above named, to award for consequential damage, as for loss of the carrying trade through the village of Miles Roches.

No decision of the court was rendered necessary upon this point, but see the opinions of the court thereupon.

The time given by the statute, within which to move to set aside these awards, viz., one year, extends to Upper as well as Lower Canada.—*Commissioners of Public Works v. Daly*, 33.

See "Arbitrator."

BANK OF B. N. AMERICA.

The Bank of British North America is entitled to sue in Upper Canada in its corporate name.—*Bank of B. N. A. v. Browne*, 490.

BAIL.

Attachment. Taking Bail under a writ of attachment for contempt. Semble, that before the return of a writ of attachment for contempt, the sheriff cannot properly take bail for the appearance of the party, without the order of a judge, but that after the return, if the party is in upon an attachment merely to compel the payment of money, the sheriff as of course may take bail to the limits.—*Lane v. Kingsmill*, 579.

Render of principal. Bail rendered their principal, and gave due notice of render within eight days after the return of process in the action against themselves on the recognizance, the plaintiffs nevertheless proceeded to judgment, the court stayed the proceedings unconditionally; that is, without exacting payment of costs up to the time of giving notice.—*Wright v. Tucker*, 24.

BAILEE.

Action against bailee for loss of horse and buggy by careless driving. Argumentative and other defective Pleas. Special assumpsit against bailee for killing a horse let to him, by careless and inconsiderate driving, and breaking buggy and harness, and not returning them. 3rd plea, that

horse was a runaway horse, and that the damage was occasioned thereby. 4th plea, that the plaintiff hired the horse, knowing him to be a runaway, and that the horse run away without the fault by the defendant. 5th plea, that the defendant did offer to return the buggy and harness, but in the broken state they were in after the runaway. Demurrer to 3rd, 4th and 6th pleas. *Held per Cur.*, pleas bad—*McKay v. Cameron*, 257.

BILLIARD TABLES.

Billiard tables. Duty imposed on, by town of London, under act of incorporation. Provincial duty. Held per Cur., that a by-law of the corporation of London, passed under the authority of the statute 10 & 14 Vic., ch. 48, and providing that the owner of a billiard table shall pay 10*l.* per annum for a license to keep the same, had not the effect of abrogating the duty imposed on billiard tables by the provincial act 50 Geo. III. ch. 6, but must be considered as a regulation superadded for the purposes of the town of London.

Semble, that the statutes 3 Vic. chap. 9, sec. 9, and 3 Vic. ch. 20, do not apply to any person merely setting up and keeping a billiard table for hire, not being at the same time a keeper of an inn or a house of public entertainment.—*Church q. t. v. Richards*, 562.

BANKRUPT.

Deed of assignment by bankrupt to one of his creditors, with a right of preference. Annexing of schedule to deed. Assignment on the face of the instrument of all bankrupt's estate to one creditor, an act of bankruptcy *per se*. *Quære*, any thing short of this,

such an act? Construction of our bankrupt act, 7 Vic. ch. 10, cl. 2 & 19, also of proviso to clause 19, and also of clauses 37 and 38, as also to the necessity the act imposes upon the assignee of a bankrupt, seeking to invalidate an assignment to a particular creditor, being required to prove that the assignment was voluntary, in addition to its being made by the bankrupt in contemplation of bankruptcy—with the knowledge of the creditor, and for the purpose of a preference.

Semble, that a jury finding, "that the assignment was executed in contemplation of bankruptcy," and that the defendant knew "when he took it that the other creditors would not be paid their debts," is insufficient to satisfy the act, and make void the assignment, without any specific direction from the judge, or finding by the jury, upon the further point of the assignment being the voluntary act of the bankrupt.

Sullivan, J., dissentiente.—Kerr, Assignee of Tennant v. Coleman, 218.

Held per Cur., that the following general plea of bankruptcy, "that after the making of the promise, and after this action had accrued, he became a bankrupt," without averring that he became a bankrupt before action brought, or that he had obtained a certificate, was good on special demurrer.—Short v. McMullen, 407.

BILLS OF EXCHANGE.

Ten per cent. damages on bills of exchange. On what sum to be paid. *Held, per Cur.*, that under the statute 51 Geo. III. ch. 9, sec. 2, the ten per cent. damages allowed on protested bills of exchange, is not to be considered as

a substitute for the difference of exchange, but is to be paid in addition to the sum paid for the bill, which would always include exchange.

Sullivan, J., dissentiente.

(Since this decision, the statute 12 Vic. ch. 76, has been passed by our legislature, removing all doubts upon the question, and leaving the law as in the opinion of the majority of the court it had existed under the old act.)—Nichols v. Raynes, 273.

BOND.

Constructing conditions in. The condition of a bond must be constructed as a whole, and any apparent repugnance may be reconciled by giving the condition effect according to the intent appearing on the face of the whole instrument.—Nichols v. Madril, 415.

CA RE. See "Arrest."

CA SA. See "Arrest."

CARRIER.

Common carrier, what constitutes a. A person engaging to transport goods for hire, is not by virtue of such engagement merely a common carrier, and as such liable for all accidents—whether negligent or not.—Benedict v. Arthur, 204.

COMMON COUNTS.

Goods sold and delivered. Money had and received.—See "Contract."—McNab v. McGill, 142.

Goods sold and delivered.—*"Good to—"* for the above goods, either to be returned or paid for," *Held, per Cur.*, that after demand of the goods, they might be sued for as for goods sold and delivered.—Harvie v. Clarkson, 27.

CONTRACT.

Consideration of.] If the plaintiff parts with any thing that is of value to himself to obtain the defendants promise, that forms a valid consideration for the promise, though the thing parted with may be of no legal value in the defendant's hands.—Bradford v. O'Brien, 417.

On Sunday. Statute 8 Vic., ch. 10, sec. 2.] Under the 2nd clause of this act, all sales of real and personal property made on a Sunday are void. *Semble*, that mortgages would not be void.—Lai v. Stall, 506.

Where a plaintiff contracts to receive for work done at its completion a certain sum of money, and then agrees to accept from the defendant the promissory note of A. B. for the sum, he may sue for the money.

If the note be not tendered at the time specified, a subsequent tender of the note and refusal will be no defence to such an action.—Fisher v. Ferris, 534.

Lumber trade. Liability of parties.] A. was cutting timber on B.'s land. B. refused to allow him to cut it, unless C., the party who was to get the timber when cut, should become answerable to A. for it. C. agreed to become so, and A. was permitted by B. to take away the timber. It was further agreed between B. and C., that upon the timber being passed at Bytown, free from duties to the government (that is, passed as private timber), B. should be paid by C. the price the government would have paid for it had it been crown timber. *Held, per Cur.*, that upon this verbal agreement B. could sue C. upon the common count for goods sold and delivered, when the time arriving for passing

the timber through Bytown; *And also*, that upon the sale of the timber at Quebec, C. might be liable to B. on the common count for money had and received.—McNab v. McGill, 142.

CONVEYANCE.

Possession — Heir-at-law — Devisee—Statute of Maintenance.]—A. dies in 1800; after his death B., his wife, remains in the exclusive possession of his land, until her second marriage with the defendant, and since then, they both continue the actual possession, the wife claiming to have a life-estate under A.'s will.

C. the eldest son of the testator A., and B., his wife, *while out of possession*, assumes to convey the land, and all his interest in it, *as heir-at-law*, to the lessor of the plaintiff — *Held, per Cur.*, that C.'s deed to the lessor of the plaintiff, was void, both at common law and by the statute of maintenance.

Held also, that C., though claiming as *devisee*, and not as heir-at-law, would otherwise have conveyed by his deed *all* his interest to the lessor of the plaintiff, whether as heir-at-law or devisee.

Semble, that the statute of maintenance applies to this Province as well to terms for years, as to estate in fee.—Doe Clark v. McInnes, 28.

Possession.] A deed of bargain and sale made by a party out of possession, while another person is in actual possession claiming the fee—is void both at common law and under the stat. 32 Henry VIII. ch. 9.—Doe Simpson v. Molloy, 302.

Construction of conveyance—as to the necessity of averring affirmatively in declaring thereon—that the plaintiff had sold certain lands—or why he had not sold

them—before he could entitle himself to sue upon the covenant for the non-payment of a sum of money—*Kay et al. v. Gamble et al.*, 267.

CORNWALL CANAL.

See "Award."—*Commissioner of Public Works v. Daly et al.* 33.

COSTS.

Costs. Trespass. Pleadings. 43rd Eliz.] That in an action of trespass *quare clausum fregit*, to which the general issue is pleaded (not *per stat.*), the judge who tried it may certify under the 43rd Eliz., to deprive the plaintiff of costs, when the damages are under 40s.—*Goodall v. Glen & Wert*, 14.

Defendant's attorney offering plaintiff to pay his costs, when known. Plaintiff afterwards issuing writ, without informing defendant of amount of costs. Writ set aside.] Where the defendant obtained a new trial, on payment of costs, and his attorney immediately afterwards wrote to the plaintiff's attorney, begging to know what his costs were, that he might pay them; and the plaintiff's attorney took no notice of the letter, but after allowing some months to elapse, moved in term time to discharge the rule for a new trial, on an affidavit that the costs were unpaid, and without any notice to the defendant's attorney to attend taxation, on the same day entered judgment, and took out an *hab. fac.*, which was executed: The court, on application of the defendant's attorney, set aside the judgment and writ without costs, and directed the defendant to be restored to possession.—*Doe Arnold v. Auljo*, 21.

Judgment as in case of a non-suit. Payment of the costs of the day and of the application.

Conditions precedent.] Payment of the costs of the day and of the applications for payments, as in case of a nonsuit, may be made a condition precedent to the plaintiff being allowed to discharge the rule for payment, and to carry down the cause for trial at the next assizes. If no costs of the day have incurred, that portion of the rule may be considered as surplusage—the rule need not be amended.—*Ross q. t. v. Meyers*, 6.

CHILD.

Application by father for custody of—as against the mother.]—Application as against the mother, by the father, to the court, for the custody of his child. *Quære*, the kind of application the father had better adopt, to bring the matter fully before the court?—*The Queen v. Emma Sheriff*, 197.

CONVICTION.

Illegal conviction by Magistrate. Illegal warrant.] A magistrate, in order to have a good justification under a conviction and warrant, must give in evidence a conviction not illegal on the face of it; and a warrant of distress supported by that conviction, and not on the face of it an illegal warrant.

Held, therefore, *per Cur.*, that a magistrate's conviction "for wilfully damaging, spoiling and carrying away six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels of the said Rogers," did not support a warrant which recited, "that whereas judgment was given against *Jonathan Eastman*, of, &c., in a suit, *Rogers v. Eastman*, for a misdemeanor, in taking apples by force and violence off and from the premises of the said Rogers, &c.,

these are, therefore, to authorise, &c.,—and also that neither the conviction nor the warrant contained a statement of an offence for which such a conviction could take place. — *Eastman v. Reid*, 611.

CORPORATION.

Weigh-master and clerk of the fish-market of the City of Toronto, recovery of salary.] The plaintiff had been appointed many years ago by the corporation of the city of Toronto, weigh master and clerk of the fish-market. He had been voted each year by the common council, a sum of money for his services during the then current year. The municipal year began on the 23rd of Jan. For the year 1847 the plaintiff had been voted 90*l.* for his salary. On the 30th of June, 1848, the corporation having determined to farm out the plaintiff's offices, he was dismissed without notice, and without any allowance being made for his services between Jan. and June of 1848. The plaintiff brought an action of assumpsit against the corporation, to recover a year's salary at the same rate as he had been voted the previous year. The corporation resisted the action upon the general grounds: 1st. That assumpsit for services rendered as upon an executed contract, not under the corporate seal, would not lie. 2ndly. That the plaintiff held his office at sufferance, both as respected tenure and allowance. 3rdly. That before action brought, the corporation should have been requested to vote an allowance; but, *Held, per Cur.*, that assumpsit would well lie; and that though the plaintiff, holding by the act of incorporation his office during pleasure, could not recover the

whole year's salary for 1848, still he was entitled to his salary for 1848, to the time of his dismissal, at the rate of salary voted to him for 1847, and that no previous demand upon the corporation to vote an allowance need be proved. — *Dempsey v. The City of Toronto*, 1.

Corporation. Assumpsit. When corporation must contract under seal.] *Held, per Cur.*, that an action of assumpsit would well lie against the Gas Light & Water Company of the City of Toronto for damages, in not fulfilling a parol agreement with the defendant, for the supply of water to the Toronto baths. *Robinson, C. J., dissentiente.*—*Blue v. Gas & Water Company*, 174.

Where the defendant pleads over and takes no exception to the declaration, the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity.—*Bank of B. N. A. v. Sherwood*, 213.

COVENANT.

Covenant for good title. Assignee. Estoppel.] A. makes a conveyance to B. covenanting, that "at the time of making the conveyance he was lawfully seized of a perfect and absolute estate of inheritance in fee simple." B. afterwards conveys to C., reciting "that he was then possessed in his own right of the land in question. *Held, per Cur.*, in an action brought by C., the assignee of B., against A., upon his covenant for good title, that C. was not estopped by B.'s recital. *Held, also*, that the usual covenant for good title is a covenant running with the land, and that it is no objection, therefore, to an action upon such a covenant by the as-

signee of the covenant against the original covenantor, that because, according to the statement in the declaration, "the grantor was not seized in fee when he gave his covenant," the covenant was broken as soon as made, and could not enure to the benefit of the assignee. *Quære*—What would the effect be if, at the time the original covenantor's deed was given, a third party had been actually in adverse possession, or if the covenantee had been evicted before he made the deed to the assignee?

Upon an action of covenant for title by an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed; his cause of action is, that he has not the interest which he supposed he was acquiring, and which he would have had if the title of the covenantor who executed the first deed had been good.—*Gamble et al. v. Rees*, 396.

Covenant. Good right to convey. *Held, per Cur.*, that the covenant of the grantor that he has good right to convey, is a covenant running with the land, and that it is no objection to an action upon such a covenant by the assignee of the covenantee against the original covenantor, that because, according to the averment in the declaration the covenant was broken *eo instanti* that it was made, it could not therefore be assigned and sued upon by the assignee.—*Scott v. Fralick*, 511.

Eviction. Apportionment of rent. In an action of covenant between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent as in debt.—*Shuttleworth v. Shaw et al.*, 539.

DEED.

The effect of the words "to the use of" in a.] It is superfluous in any deed or bargain and sale to express that the land is to be held "to the use" of the bargainee; there can be no other limitation of the use than to the bargainee. The omission, therefore, of these words can have no effect in transferring the legal title to some person other than the bargainee.—*Gamble et al. v. Rees*, 397.

Construction of.] Held, also, that the deed as set out in the pleadings in this case, shewed clearly an intention on the part of the bank to take it as collateral security, and not as an assignment in satisfaction of the notes.—*Bank of B. N. A. v. Sherwood*, 552.

DE INJURIA.

In an action by the endorsee against the maker of a note, a plea of payment or satisfaction by the maker to the payee after the note became due, is well traversed by the replication of *de injuria*.—*Mutlebury et al. v. Hornby*, 61.

Robinson, C. J., dissentiente.

To an action by the endorsee against the maker of a note payable to bearer, the defendant pleaded payment or satisfaction to the payee before the note became due, and that it was transferred to the plaintiff after such payment, without any consideration from the plaintiff to the endorser, and that the plaintiff held the same without having given consideration therefor. Replication, *de injuria*. Demurrer. *Held, per Cur.*, replication of *de injuria* good.—*Brooke v. McCausland*, 104.

Robinson, C. J., dissentiente.

Trover. De injuria. Express

colour.] The special title which a sheriff acquires in goods seized by him in execution, when pleaded as a defence to an action of trover may be well answered by the replication de injuria. The allegation by way of express colour in a plea is not traversed by the replication de injuria.—*Boswell v. Ruttan, Sheriff*, 199.

DEMAND OF POSSESSION.

Demand of possession—Particularity required therein, in pointing the defendant to the precise parcel of land the plaintiff is seeking to recover.—*Doe Jeffreys v. Williams*, 160.

A. had a lease from the government of a clergy reserve lot for 21 years, ending in 1837. A. sublet to B. In 1843, after the term had expired, A. obtained a patent in fee from the crown, and finding B. still in possession he brought an action of ejectment against him. *Held, per Cur.*, that under these facts B. was not entitled to a notice to quit, or to a demand of possession.—*Doe Wismer v. Hearn*, 193.

DEMURRER, See "Pleading."

DISTRICT AND COUNTY COURT.

Appeal from District Courts on special points of demurrer.] *Seem*, that upon appeals to this court from the district courts, on points of special demurrer, it does not follow that effect will be given to all objections which would be allowed to prevail in this court.—*Outwater v. Dafee*, 256.

Recognizance.] *Seem*, that a recognizance taken in the district court may be sued on in the Queen's Bench.

When a recognizance has been taken in open court before the

judge of the district court, and it is so averred *Held, per Cur.*, that under the 8th Vic., ch. 13, sec. 20, 23 and 50, the filing of the recognizance in the office of the clerk is not necessary to perfect it.—*Cockrane v. Eyre et al.*, 289.

Jurisdiction of, in an action on the case for a false return to a writ of fi. fa.] The district courts, under the statute 8 Vic., ch. 13, sec. 5, have no jurisdiction in an action on the case for a false return to a writ of *fi. fa.*—*Bell v. Jarvis, Sheriff*, 423.

DOWER.

Pleadings and evidence in.] *Held, per Cur.*, that under a plea to an action of dower, that the husband was not seized of the lands, the demandant could not be allowed to recover on merely giving evidence that the husband had been in possession of the estate, without proving his title.—*Johnson v. McGill*, 194.

Limitation in point of time to an action of.] Our statute 4 Wm. IV., ch. 1, makes the remedy for dower subject to limitation in point of time.

The right to dower commences on the death of the husband, and must be brought within twenty years from that time.—*German v. Grooms*, 414.

Issue for non-tenure in an action of Dower What evidence under.] *Seem*, that where the evidence shews that the plaintiffs in an action of dower could have assigned dower, which would be binding upon themselves, they are entitled to succeed upon the issue of non-tenure, without any reference to the comparative goodness of their title.—*McClellan and Wife v. Meggott et al.*, 551.

EASEMENT.

Twenty years user of an. The right it gives. Excess in the user. Injury must be proved as laid.]

The right which a party has acquired by twenty years uninterrupted user to pen back the water of a stream in certain quantities for the purposes of his mill, will be strictly confined to the right as *actually exercised*; and any subsequent *excess* beyond the twenty years' enjoyment of such right if injurious to others, will render the party liable to an action.

The description of injury complained of in the declaration by the erection of the mill-dam must be substantially proved as laid in some one of its counts.—*McNab v. Adamson*, 100.

Plea of justification to diversion of water. Evidence under general issue.] A., a riparian proprietor below the stream, pens the water back upon a proprietor B. above, so as to overflow, at certain seasons, B's land; upon which B. sues A. and recovers damages.

B. then digs sluices close to the side of the stream, which has the effect of diverting the water in large quantities (much larger than that penned back by A's dam) from the natural bed of the stream and past A's mill.

A. sues B. B. justifies the diversion of the water, contending that his sluices became necessary to remove the injury caused by A's dam and his raising the water thereby; but, *Held, per Cur.*, such justification no defence, under any state of pleading, certainly not under the general issue, which was the only plea in this case.

Macaulay, J., dissentiente, who was of opinion, that a new trial should be granted for misdirection,

on the ground that the diversion of the water having been occasioned by the *combined act* of both the plaintiff and defendant—viz., by the dam of the plaintiff and by the sluices of the defendant—not being merely a question of damage but a good defence to the action, and admissible under the general issue, should have been left at the trial as a question of fact for the jury.—*Adamson v. McNab*, 113.

EJECTMENT.

Demand of possession—Particularity required therein, in pointing the defendant to the precise parcel of land the plaintiff is seeking to recover.—*Doe Jeffrey v. Williams*, 160.

Notice to quit. Demand of possession.] A. had a lease from the government of a clergy reserve lot for 21 years, ending in 1837. A. sublet to B. In 1843, after the term had expired. A. obtained a patent in fee from the crown, and finding B. still in possession, he brought an action of ejectment against him. *Held, per Cur.*, that under these facts B. was not entitled to a notice to quit, or to a demand of possession.—*Doe Wismer v. Hearn*, 193.

Striking out one of two demises.] Where upon two separate demises laid in a declaration, a verdict passes for the plaintiff on one, and for the defendant on the other, the court will not, upon the application of the defendant, strike out the demise to the successful plaintiff, on the ground of want of authority for suing in his name, except in very clear cases.—*Doe Simpson v. Molloy*, 303.

A husband entitled to land in right of his wife, may bring ejectment without her being joined in the action.—*Doe Eberts v. Montreuil*, 515.

Tenant not having possession from Landlord, putting him to proof of title.] *Semble*, that A. in possession of land to which he pretends no claim, taking a lease from B., who represents himself as the owner, is not estopped in an action of ejectment from putting B. to proof of title.—*Doe Radenhurst v. McLean*, 530.

See "Evidence."—*Doe Osborne v. McDougall*, 135.

ESTOPPEL.

A. makes a conveyance to B., covenanting that "at the time of making the conveyance he was lawfully seized of a perfect and absolute estate of inheritance in fee simple." B. afterwards conveys to C. reciting "that he was then possessed in his own right of the land in question." *Held, per Cur.*, in an action brought by C., the assignee of B., against A., upon his covenant for good title, that C. was not estopped by B.'s recital.—*Gamble et al. v. Rees*, 396.

See "Ejectment."—*Doe Radenhurst v. McLean*, 530.

EVIDENCE.

Semble, That a plaintiff in ejectment, relying, in the opening of his case, upon a *prima facie* title of possession, and being met by proof on the part of the defendant of a prior possession, cannot repel such proof by attempting to shew the possession of defendant that of a tenant to him (the plaintiff) as landlord—he should go into his case fully in the first instance.—*Doe Osborne v. McDougall*, 135.

Robinson, C. J., dissentiente.

Endorser's liability to holder. Promise. Proof of. Issue.] Upon the issues of non-presentment and non-payment, the holder of a note will be entitled to reco-

ver against the endorser, by proving his subsequent express or implied promise to pay, even though the promise was made after the action brought, and after issue joined,—*McCuniffe v. Allen et al.*, 377.

Injury to mill-dam.] The description of injury complained of in the declaration, by the erection of the mill-dam, must be substantially proved as laid, in some one of its counts.—*McNab v. Adamson*, 100.

Issue of non-tenuit in an action of dower. What evidence under.] *Semble*, that where the evidence shews that the plaintiffs in an action of dower could have assigned dower, which would be binding upon themselves, they are entitled to succeed upon the issue of non-tenuerunt, without any reference to the comparative goodness of their title.—*McClellan and wife v. Meggott*, 551.

Dower.] *Held, per Cur.*, that under a plea to an action of dower that the husband was not seized of the lands, the demandant could not be allowed to recover on merely giving evidence that the husband had been in possession of the estate without proving his title.—*Johnson and wife v. McGill*, 194.

Ejectment. Alienation by patentee.] The lessor of the plaintiff proved a patent from the crown, which had been in his possession since 1803. The defendant claimed under a deed upon one A. to B. in 1806. A deed was shewn to have been in possession, and no deed from the lessor to A. was produced, nor any evidence given that he had ever executed such a deed. The facts proved only went to shew a bare probability that he might have done so. The jury, however, upon these facts

being left to them as very slight evidence of the patentees having made a deed to A., found for the defendant; but, *Held, per Cur.*, that the verdict must be set aside without costs, there being no legal evidence to be left to the jury on the facts stated, to shew an alienation by the patentee,—*Doe Petit v. Renard*, 501.

Plea, not guilty, in slander. Evidence under.] The plea of not guilty, in an action of slander, operates as it did before the new rules, not merely in denial of speaking the words, but of speaking them maliciously in order to defame. All the circumstances, therefore, immediately preceeding and attending the speaking of the words, may be given in evidence by the defendant under such plea.—*Keegan v. Robson*, 375.

EXECUTOR.

The effect of a prior endorser of a note being made executor by the holder.] A. makes a note payable to B. or order; B. endorses to C. who endorses to D.; D. the holder dies, leaving B. one of his executors. The executors of D. sue C.—*Held, per Cur.*, that D. having made B. his executor, B. was discharged from the debt, and that there was no remedy against the subsequent endorser.

Semble, that though under the authority of 4 T. R. 470, where a plaintiff suing in his own name is liable over to the defendant by reason of a prior endorsement, he cannot recover, yet if he sues with others, not in his own name, but as an executor, he may.—*Jenkins v. McKenzie et al.* 544.

Statute of Limitations.] *Semble*, that the court has authority to prevent an attorney pleading the Statute of Limitations to defeat a client's just claim, but that the

power does not extend to executors.—*Dougall v. Executors of Cline*, 546.

Whether a person has made himself an executor *de son tort*, is a mixed question of law, and facts. The jury must in the first place, find the facts, if disputed, and the courts are to say whether those facts create the executorship.

A party may make himself an executor *de son tort* by answering as executor to any action brought against him, or by pleading any other plea than *ne unques* executor.—*Haacke v. Gordon*, 424.

EX-SHERIFF.

The validity of a purchaser's title under an ex-sheriff. Deed made after the writ against lands had expired, and after he had gone out of office. What act of the sheriff, after a writ against lands has been put into his hands, can be said to be an interception of execution.] *Held per Cur.*—(Draper, J., dissentiente,) that the facts mentioned in the statement of this case, and which are too long to repeat in the digest, constituted such an inception of the execution against lands by the sheriff during the currency of the writ, and while he was in office, that a deed made under such execution, by the same sheriff, after the writ was current, and after he had gone out of office, passed the legal estate to the purchaser.—*Held also*, (Draper, J., dissentiente,) that the conduct of the execution debtor (mentioned below,) shewed an acquiescence on his part in the ex-sheriff's right to proceed with the sale of land as he did, under the writ.—*Doe Tiffany v. Miller*, 426.

FI FA, LANDS.

See "*Ex-Sheriff.*"—*Doe Tiffany v. Miller*, 426.

GAS COMPANY OF TORONTO.

See "Action."—Gas Company v. Russell et al., 567.

GOODS SOLD AND DELIVERED.

"Good to ——— for the above goods, either to be returned or paid for." *Held, per Cur.*, that after demand of the goods, they might be sued for as goods sold and delivered.—Harvie v. Clarkson, 27.

Held, per Cur., that upon the following agreement—"On or before the 10th of May, 1846, I promise to pay D. Thompson or bearer pine saw-logs, &c., for value received, &c. H. Heffernan"—the logs must be considered as paid for; and that Heffernan could not recover from Thompson the value of the logs in an action of defendant upon the common counts, for goods sold and delivered.—Heffernan v. Thompson, 207.

GOOD NOTES.

Semble, that payment in good notes does not necessarily mean in "good negotiable notes."—McArthur v. Winslaw, 144.

HIGHWAY.

Dedication of a road by tenant. Landlord's acquiescence.] A tenant for years cannot, by acquiescence or otherwise, dedicate a portion of the leasehold for a public highway so as to bind the revisioner.

Semble, That where the reversion comes at once, without any interval of time, to the tenant, his acquiescence in the dedication, while a tenant, will not bind him, in the absence of evidence of acquiescence in the dedication on the part of the landlord.

Where, therefore, a tenant under the crown had been convicted

upon an indictment for taking exclusive possession of the road, after he had obtained his patent, the court refused to give judgment upon the conviction, until evidence had been given to shew the crown a consenting party to the dedication.—The Queen v. Wismer, 293.

HUSBAND AND WIFE.

A husband entitled to land in right of his wife, may bring ejectment without her being joined in the action.—Doe Eberts v. Montreuil, 515.

INDEMNITY BOND.

Indemnity bond. Old debts. New advances.] The construction of an indemnity bond—as to whether it made the obligor liable for old debts, or only for new advances from the date of the bond?—Wright v. Benson, 131.

INSOLVENT DEBTOR.

Discharge.] A prisoner in execution for debt, cannot, by assigning his effects in trust for such creditors as choose to come in, and, on receiving a dividend, give him an absolute discharge, make himself an insolvent debtor, in the terms of the stat. 10 & 11 Vic. cap. 15.—Gillespie v. Nickerson, 628.

INSURANCE.

Partially insurance against fire. What amount assured entitled to receive under. The kind of injury to property, other than by fire assured entitled to recover for.] Where a person insures upon his house or goods for a part only of their value; and suffers a loss equal to the full amount assured, that sum, unless the policy is otherwise specially framed, must be paid by the insurer, and not merely such a proportion of that sum as would correspond with the proportion between the sum insured and the whole value of the property on

which the insurance was effected. The condition in the policy, "that in case of the removal of property to escape conflagration, the company will contribute ratably with the assured, and other companies interested, to the loss and expense attending such act of salvage," is not a condition which will have the effect of changing in this respect the law of partial insurance.

Semble, That in the form adopted in ordinary policies injuries to goods by wet, or in any manner from the exposure during the confusion of the fire before they can be got to a place of safety, and good lost or stolen in the confusion arising from the fire, and of the destruction, injury or loss of which the fire can be said to be the proximate cause, are within the terms of the policy, but, in suing for such loss, the plaintiff must describe the occasion and manner of loss according to the fact.—Thompson v. Montreal Insurance Company, 319.

Fire insurance. Construction of Act. Effect of mere change of occupation in the policy. What an alienation. *Semble*, that a mere change in the occupation of a house insured against fire, without notice, &c., there being no other alteration in the manner or purpose of occupation will not avoid a policy of insurance effected under the provision of the act 6 Wm. IV, ch. 18, incorporating the Wellington District Insurance Company. *Semble*, also, that a demise of the house insured for one year is not "an alienation" within the act.—Hobson v. The W. D. M. Fire Insurance Company, 536.

INTERPLEADER.

Interpleader Act. Making up the issue. Order of court thereupon.

Where no time has been limited by an interpleader order for the plaintiff to make up the issue between the parties, the court will order the issue to be made up by the claimants on or before a certain day, or on default thereof to be barred from prosecuting the claim.—Shields v. Davis, 628.

JOINT TENANT.

Termination of a joint tenancy.

A conveyance in fee to A. by B., the survivor of two joint tenants, "of his undivided half of the lot," puts an end to the joint tenancy, and makes the joint tenant B. till he dies a tenant in common with A., and B. by his will may devise the moiety he has not by his deed conveyed to A.—Doe Eberts v. Montreuil, 515.

LANDLORD AND TENANT.

A party in possession as tenant will not be allowed to purchase from a stranger over his landlord's head.—Doe Simpson v. Molloy, 302.

Action on the case by lessee against assignee of assignee. A lessee assigns his interest, and the assignee of the assignee neglecting to pay rent and to keep the premises in repair, the lessee is sued by the lessor, who upon being compelled to pay the rent and damages, sues the assignee of the assignee in a special action on the case for the damages he has sustained. *Held, per Cur.*; that the lessee had a good right of action on the case against the assignee, for the rent and damages he had been obliged to pay the lessor.—Ashford v. Hack, 541.

Dedication of road by tenant. Landlord's acquiescence. A tenant for years cannot, by acquiescence or otherwise, dedicate a portion of the leasehold for a

public highway, so as to bind the reversion.

Semble, that when the reversion comes at once, without any interval of time to the tenant, his acquiescence in the dedication, while a tenant, will not bind him in the absence of evidence of acquiescence in the dedication on the part of his landlord; where therefore a tenant, under the crown, had been convicted upon an indictment for taking exclusive possession of the road after he had obtained his patent, the court refused to give judgment upon the convictions, until evidence had been given to shew the crown a consenting party to the dedication.—*The Queen v. Wismer*, 293.

Tenant not receiving possession from the Landlord, putting him to proof of title.] *Semble*, that A., in possession of land to which he pretends no claim, taking a lease from B., who represents himself as the owner—is not estopped in an action of judgment from putting B. to proof of title.—*Doe Radenhurst v. McLean*, 530.

LIMITATIONS, STATUTE OF.

Joint and several makers of notes.] The promise to pay by one of several joint and several makers of a note, will take the case out of the Statute of Limitations.—*Sifton v. M'Cabe*, 390.

Held, per Cur.—That the following expressions of the defendant, "The notes are genuine—that is, I made them—but I am under the impression that they were paid through Messrs. Gamble and Boulton," and "I don't think I am called upon to have any further conversation with you about them"—were not sufficient to take the case out of the statute of Limitations —*Grantham v. Powell*, 494.

Attornies. *Power of the court to prevent attornies pleading unjustly the Statute of Limitations to actions for monies received for clients.*] The following answer of an attorney to his client when demanding payment of monies left for collection, "that the debt had not been paid—that the defendant had no property, and that he (the attorney) could not help the debt being unpaid," not containing an express promise to pay, or admissions from which a promise could be implied —*Held, per Cur.*, not sufficient to take the case out of the Statute of Limitations, though it was subsequently proved that at the time of such answer the attorney had collected his client's debts.

Semble, That the court has authority to prevent an attorney pleading the Statute of Limitations to defeat a client's just claim, but that this power does not extend to his executors.—*Dougal v. Executors of Cline*, 546.

LORD'S DAY.

Sales on.] Under the 2nd clause of the 8 Vic. ch. 10, all sales of real and personal property made on a Sunday are void.

Semble, That mortgages would not be void.—*Lai v. Stall*, 506.

MAGISTRATE.

A conviction made by a magistrate so long as it has not been set aside, protects him against an action of trespass.—*Gates v. Devenish*, 260.

Notice of action against. Particulars required to be stated in.] In giving notice of action to a magistrate, the notice must declare the place of residence of the attorney. The subscription of the attorney therefore at the bottom of the notice in this form, "A. B.,

attorney of the said C. D., Simcoe Talbot District," was held insufficient.—*Bates v. Walsh*, 498.

Illegal conviction—Illegal warrant.] A magistrate in order to have a good justification under a conviction and warrant, must give in evidence a conviction, *not illegal on the face of it*, and a warrant of distress supported by that conviction, and not on the face of it an illegal warrant. *Held, therefore, per Cur.*—That a magistrate's conviction "for wilfully damaging, spoiling, taking and carrying away six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels of the said Rogers," did not support a warrant which recited, "that whereas judgment was given against Jonathan Eastman, of, &c., in a suit, *Rogers v. Eastman*, for a misdemeanor, in taking apples by force and violence off and from the premises of the said Rogers, &c., these are, therefore, to authorise, &c.;"—and also that neither the conviction nor the warrant contained a statement of an offence for which such a conviction could take place.—*Eastman v. Reid*, 611.

MAINTENANCE.

Statute of.] *Semble*, that the statute of maintenance applies in this province, as well to terms for years as to estates in fee.—*Doe Clarke v. McInnes*, 28.

MORTGAGES.

Made on a Sunday.] *Semble*, That mortgages made on a Sunday would not be void under the 2nd clause of the 8 Vic. ch. 10.—*Lai v. Stall*, 506.

NATURALIZATION.

Seven years residence of a pa-

rent (a foreigner, in this province—right of son to inherit.—*Statutes Geo. IV. ch. 21; 4 & 5 Vic. ch. 7; 7 Vic., ch. 43.*—*Doe Chandler v. Tessier* 216.

NEW TRIAL.

Surprise. Cause being taken out of turn. Affidavit of merits.] When a defendant applies for a new trial, on the ground that he was taken by surprise, by the cause being taken out of its turn, and was unprepared to enter into his defence, he must not rely on a general affidavit of merits, but must shew that he had a defence, admissible under the pleadings, which he would have been able to sustain.—*Moore v. Hicks*, 27.

At instance of plaintiff.] It is only in very plain cases that the court will grant a new trial at the instance of the plaintiff, who has already a verdict for something.

In a qui tam action.] The 18 Eliz, ch. 5, prohibits the compromise of a qui tam action, without the leave of the court. When therefore, a plaintiff who had brought such an action agreed to drop it upon being paid his costs, and in a subsequent action for these costs recovered much less than he thought the jury should have given him, and applied to the court for a new trial, the court from the nature of the transaction refused to give him any relief.—*Bleeker v. Meyers*, 134.

The defendant, in moving the court in banc, for a new trial on the ground that his cause was taken on the first day of the assizes, in the absence of his attorney or counsel, must unequivocally state that he has a just and legal defence to the action.—*Par-dow v. Beatty*, 496.

NOTICE.

Notice when required to be given to defendant, of Plaintiff's performance of his agreement.] When by an agreement, the plaintiff is to deliver, not personally to the defendant, but on certain parts of a road, a certain quantity of timber to build certain bridges, he must notify the defendant of the delivery, before he can bring an action.] —Watson v. Gorren, et al. 542.

Notice to quit.] A. had a lease from the government of a clergy reserve lot for 21 years, ending in 1837. A. sublet to B. In 1843, after the term had expired, A. obtained a patent in fee from the crown, and finding B. still in possession, he brought an action of ejectment against him. *Held, per Cur.*, that under these facts B. was not entitled to a notice to quit, or to a demand of possession.—Doe Wismer v. Hearn, 193.

Notice to a magistrate.] In giving notice of action to a magistrate, the notice must declare the place of residence of the attorney. The subscription of the attorney therefore at the bottom of the notice in this form: "A. B., attorney for the said C. D., Simcoe Talbot District," was held insufficient. —Bates v. Walsh, 488.

NUL TIEL RECORD.

Upon the plea of *Nul tiel Record* being pleaded by the defendant, the issue is complete, and it is unnecessary for the plaintiff to reply; but if he should do so, and pray an inspection, and the defendant should demur, on the ground of informality—though the replication be unnecessary—the defendant might have judgment on demurrer.

The demurrer to this replication

was held bad—the grounds taken being insufficient.—Grantham v. Jarvis, 511.

PATENT.

Pleadings. Patents. Meaning of the word "improvements."] The plaintiff complained of the defendant having infringed a patent, which he (the plaintiff) had obtained for a new and useful mode of generating and distributing heated air in dwelling houses.

Plea.—That the defendant was not the true and first inventor of the said improvement in the said declaration mentioned, in manner &c. Demurrer to plea, as bad, in traversing something not averred in the declaration. *Held, per Cur.*, plea good.—Mills v. Scott, 205.

PAYMENT.

Semble. That payment in "good notes" does not necessarily mean in "good negotiable notes."—McArthur v. Winslow, 144.

PLEADING.

Special agreement. Request to deliver, &c.] Upon an agreement to deliver wheat for the plaintiff, at the mill of a third party, naming him, the plaintiff averred, in his declaration "that he was always willing to accept the wheat at the place aforesaid, and to have paid the defendant for the same, at the rate in that behalf aforesaid; whereof the defendant had notice."

Held per Cur., on a motion to arrest the judgment—declaration good. *Held, also*, that it was not necessary for the plaintiff to prove under this agreement, a request on his (the plaintiff's) part to the defendant to deliver—or that he was at the mill of the third party on the day named, to accept a delivery of the wheat.—Wright v. Weed, 140.

Trover. De injuria. Express colour.] The special title which a sheriff acquires in goods seized by him in execution, when pleaded as a defence to an action of trover may be well answered by the replication *de injuria*.

The allegation by way of express colour in a plea is not traversed by the replication *de injuria*.—*Boswell v. Ruttan, Sheriff*, 199.

Pleadings. Sale of land. Executed and executory considerations. Necessity of precise averments in pleading. Conveyance of land or a readiness to convey, when to be averred as a consideration precedent before demand of purchase money.] The plaintiff stated in his declaration, that in consideration that the plaintiff, at the request of the defendant, would (as by the *sa d agreement* the plaintiff in fact did) sell to the defendant certain premises, he, the defendant, undertook that he would pay the plaintiff for the said premises certain sums of money in good notes, and at the time, &c., (as therein alleged.) Breach—that though the plaintiff was ready to accept the notes, and had performed all things by him to be performed—the defendant had altogether failed in his agreement, &c.

Held, per Cur., upon demurrer to declaration — declaration bad, in not averring in precise terms that the plaintiff had conveyed the premises, &c., to the defendant, or was ready and willing to convey.—*Macaulay, J.*, dissentiente.

Semble, That payment in “good notes” does not necessarily mean in good *negotiable* notes”—*McArthur v. Winslow*, 144.

Debt on bond. Pleadings.] To

an action of debt on bond for the non-performance of an award the defendant pleaded seven different pleas, all setting up various objections to the validity of the award. The court held upon demurrer, all the pleas bad.—*Tinkle v. Arnold* 168.

Construction of conveyance—as to the necessity of averring affirmatively in declaring thereon, that the plaintiff had sold certain lands, or why he had not sold them, before he could entitle himself to sue upon the covenant for the non-payment of a sum of money.—*Kay et al. v. Gamble et al.*, 267.

Introductory part of plea must be limited.] A plea must be taken to be pleaded to the *whole* declaration unless it is confined in the introductory part of it to one or more counts.—*Poulton v. Dolmage*, 277.

Pleading over. Corporation.] Where the defendant pleads over, and takes no exception to the declaration, the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity.—*Bank of B. N. A. v. Sherwood*, 213.

Disjunctive replication. Surplusage and repugnance in pleas.] Action on a bond. Plea that bond was obtained from defendant, by Ham and others in collusion with him, by fraud, &c. Replication—that bond was not obtained by fraud of Ham and others in collusion, &c. *Demurrer*—that replication should have been in the disjunctive. *Held, per Cur.*, replication good.—*Turner v. Ham*, 255.

Trespass. Justification under fi. fa. Return of writ.] A plea, justifying an act of trespass in seizing goods, &c., under a writ of *fi. fa.*, must shew that the goods were

seized before the return of the writ.—*Outwater v. Defoe*, 256.

Covenant for title.] In covenant for good title, brought by the assignee against the original covenantor, it is no objection to the declaration, that it does not shew that the covenantor or assignee may not have been seized of a good estate in the land *at the time of action brought*.—*Gamble et al. v. Rees*, 397.

Plea of defendant's bankruptcy. Demurrer.] *Held, per Cur.*, that the following general plea of bankruptcy, "that after the making of the promise, and after this action had accrued, he became a bankrupt," without averring that he became a bankrupt before action brought, or that he had obtained a certificate, was good on special demand.—*Short v. M'Mullen*, 407.

The plaintiffs sued for work and labour, as attorneys, in the first count, and then added two counts for money paid, and an account stated, not stated by or with them as attorneys. The defendant pleaded to the *whole declaration*, as if the plaintiffs had been claiming the moneys *as attorneys*.

Held, per Cur., plea bad.—*Baby et al. v. Ardin*, 408.

A plea that there was no written contract, as required by the Statute of Frauds, is bad, as amounting to a denial of the contract.

A plea that a copy of the attorney's bill was not delivered according to the statute, is not a plea *to the merits*. Judgment for the plaintiff, therefore on the plea, is no bar to a second action.—*R. & W. Dempsey v. Winstanley*, 409.

In case (by the plaintiff in ejectment) against A. and B. as common carriers, for not delivering within a reasonable time the record of *Nisi Prius*, at the assize to

town, *Held, per Cur.*, that it was not competent for the defendant to put in issue the plaintiff's title to the land.

Where several defendants are charged as common carriers in case, and they plead, traversing only the delivery to them of the parcel, without saying "*or any or other of them*," *Held per Cur.*, plea good.—*Parke et al. v. Davis et al.*, 411.

32 *Henry VIII*, ch. 9.] To bring the giving of a note in payment for land within the statute—32 *Henry VIII*. ch. 9, care must be had to charge enough to meet the provisions of the statute—where therefore the defendant merely averred that the plaintiff was not, for a year next before the bargain "in receipt of the rent and profits," without saying that he was not "in possession of the land" or "of the reversion or or remainder thereof." *Held per Cur.*, plea bad.—*Nichols v. Madill*, 475.

Setting out consideration in declaration. Plea.] Where the plaintiff sets out the consideration on which the defendant's promise was made a plea by the defendant "that there was not at any time *any* consideration for making the promise," is bad.

An uncertainty in the statement of a part of a consideration for the defendant's promise with respect to a part only of the plaintiff's demand, does not make the declaration bad on general demurrer.—*Bradford v. O'Brien*, 417.

Surrender.] To an action of covenant for not surrendering land at the expiration of the lease, it is a bad plea to plead a surrender by a third party (whose legal estate is not shewn to have been derived from the plaintiff,) to the Queen

and that, therefore, the land, at the expiration of the lease, did not belong to the plaintiff.—*Russell et ux. v. Graham*, 497.

Nul Tiel Record. False return. Sheriff.] Upon the plea of *nul tiel record* being pleaded by the defendant, the issue is complete, and it is unnecessary for the plaintiff to reply; but if he should do so, and pray an inspection, and the defendant should demur on the ground of informality, though the replication be unnecessary, the defendant might have judgment on demurrer. The demurrer to this replication was held bad, the grounds taken being insufficient.

A plea by the sheriff to an action for a false return to a writ of *fi. fa.* set out in the declaration, that there was no writ of *fi. fa.* against A. B.'s goods *duly* sued out and *duly* returned, is bad. A plea by the defendant that he did not seize any of the plaintiff's "goods," without adding "or chattels," is good on special demurrer.

The sheriff sued by the execution creditor for a false return, cannot plead to the merits of the original action.—*Grantham v. Jarvis*, 511.

Trespass. Justification.] To an action of trespass for breaking and entering the plaintiff's house, the defendant pleaded that the plaintiff was violently assaulting his (the plaintiff's) wife and child and that he entered, &c., as he lawfully might do, to prevent the plaintiff committing the said breach of the peace. *Held, per Cur.*, plea bad in substance.—*Rockwell v. Murray*, 412.

Debt on recognizance of bail entered into in the District Court. Plea, that no *ca. sa.* had been duly

sued or prosecuted out of the District Court. Replication, that the plaintiff did sue out and prosecute a *ca. sa.* setting it out, and praying that a day might be given to bring in the record. The record certified to this court by the judge of the District Court, *agreed with the replication. It was therefore, held per Cur.*, that under the issue, no objection could be taken to the *ca. sa.* as in some particulars varying from the judgment. It was *also held*, that it was no objection that it did not appear upon the record, that the *ca. sa.* had lain four days in the sheriff's office before the return day, this being matter of practice of another court, and not made the subject of enquiry upon the issue raised in this court.—*Cockrane v. Eyre*, 594.

Pleadings. Accord and satisfaction, what amounts to.] Goods, agreed to be accepted in *satisfaction and discharge* of the causes of action in the declaration, and of all damages, &c., must be actually delivered. Mere *readiness to deliver* will not do.

Semble, that a plaintiff may, after breach of the promise stated in the declaration, legally agree to take a contract or new agreement to deliver goods, &c., in full satisfaction of the former promises, and of the damages accruing from the breach of them.—*Thomas v. Mallory*, 221.

Pleadings. Covenant. Eviction. Apportionment of rent.] In an action of covenant, between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent, as in debt.—*Shuttleworth v. Shaw*, 539.

Held, per Cur., that the deed

asset out in the pleadings in this case, shewed clearly an intention on the part of the Bank to take it as collateral security, and not as an assignment in satisfaction of the notes.—Bank of B. N. A. v. Sherwood, 553.

Attachment for contempt in not paying moneys. Sheriff sued for an escape of party arrested on. Averments in declaration. Plea. Bail to the limits.] In an action of escape against the sheriff, a plea that the prisoner escaped without the knowledge of the sheriff, to places unknown to the sheriff, and voluntarily and without knowledge of sheriff returned into the custody of the sheriff, is insufficient. The plea ought to aver that the sheriff did not know where the prisoner was during any period of his absence.

Semble, That if an attachment for contempt in not paying moneys is to be regarded as mesne process, it should be averred in the declaration for an escape, that the sheriff had not the party in court to answer the exigency of the suit. The averment merely, that on the return day of the suit the sheriff allowed the party to go at large, will not do.

And if the attachment is to be regarded as an execution, *Semble*, it then requires something in the nature of a judgment to support it. The merely averring that the plaintiff sued out an attachment for contempt, without stating what the contempt consisted in, or by what authority it had been determined the party was guilty of a contempt is insufficient. A good legal foundation for the attachment must be shewn on the record.—Lane v. Kingsmill, 579.

Recovery of Penalty under 50 Geo. III., ch. 6. Billiard Tables.]

Held, that an action of debt would lie for a penalty.

Also, that in an action for the penalty, it need not be averred that the defendant had not paid the penalty.

Also, That it need not be averred in the declaration that the defendant kept the table without having first obtained license from the inspector of licenses, that he did so without first having obtained a license, is sufficient. *Also*, that it need not be averred that the offence was committed after the 29th Sept., 1810.—Church qui tam. v. Richards, 462.

Case for maliciously suing out a commission of bankruptcy. Necessary averments in declaration.] In an action for maliciously suing out a commission of bankruptcy against the plaintiff, it should be distinctly averred in the declaration, that the defendant acted without cause; the averment that defendant falsely and maliciously swore to the debts, is not sufficient.

The declaration should also state, that the commission of bankruptcy issued upon the affidavits set out, and that the affidavits were made before a competent authority.

It should also be averred that the commission was superseded before the action was commenced.—Locke v. Wilson, 600.

Patent, meaning of the word "improvements,"] The plaintiff complained of the defendant having infringed a patent which he (the plaintiff) had obtained for a new and useful mode of generating and distributing heated air in dwelling houses.

Plea—That the plaintiff was not the true and first inventor of the said improvement in the said declaration mentioned, in manner,

&c. Demurrer to plea, as bad in traversing something not averred in the declaration. *Held, per Cur.*, plea good.—Mills v. Scott, 205.

Immaterial issues. Costs of the case.] *Held, per Cur.*, that the issue tendered by the 4th plea, that no deed of assignment of the said supposed indenture of lease, was ever granted, assigned and set over by the plaintiff to the defendant and others, &c., is an immaterial issue, and though found for the defendant, does not deprive the plaintiff of the benefit of his verdict on the other pleas and of full costs in the cause.—Perry v. Richmond, 285.

Return by Sheriff to a writ of fi. fa. When an estoppel against plaintiff. To an action against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, the bare fact that the plaintiff, after such a return sued out a *ca. sa.* will be no defence, unless it be further averred in the plea, that the plaintiff accepted the return of *nulla bona* with a knowledge at the time that it was false.—Bays v. Ruttan, Sheriff, 263.

POUNDAGE.

Ca. sa. Sheriff when entitled to poundage under. Attorney.] When the sheriff has the party in custody on a *ca. sa.*, *Held, per Cur.*, that he has so far made the remedy (the body being satisfaction) as to give him his claim to poundage under our rule of Hilary Term, 10 Vic.

No action lies by the sheriff against the plaintiff's attorney, to claim poundage upon an execution which the attorney has placed in his hands to be executed.—Corbett, Sheriff, v. Mackenzie, 605.

PRACTICE.

Staying proceedings till costs paid.

When plaintiff at liberty to enter judgment.] Rule made in term, that on payment of a certain sum and costs, further proceedings should be stayed, on the verdict given in the cause at the last assizes. This rule was served on the plaintiff's attorney on the second Friday in Term, with an appointment to tax costs. *Held per Cur.*, that the rule did not stay proceedings till the money was paid or tendered, and that the plaintiff was not irregular in entering his judgment on the next day, being the last day of term.—Forster v. Hodgson, 16.

Alteration in the jurata after new trial granted.] *Held, per Cur.*, that the nisi prius record not having been altered after a new trial granted, but the entry being allowed to continue as before, of the jury being respited to the term next following the preceding assizes, the defect could not be cured by amendment. The decision in this court on that point of Doe Crooks v. Cumming, (2 Cam., 380) was adhered to.—Smith v. Shaver, 20.

Application for judgment non obstante, or to arrest judgment, when may be made.] *Semble*, that applications for judgment non obstante, or to arrest judgment, are not limited with us, as in England, to the first four days of the term next after the assizes. — P. S. The New Rules affect this decision.—Perry v. Richmond, 285.

Copy of process. Irregularity in.] The omission of the letters L. S., or of any mark to denote a seal in the copy of a writ, is not an irregularity. — Cameron v. Wheeler, 355.

The court will not carry into effect an undertaking between the

parties, that one of several defendants, who has not pleaded, shall be considered as having pleaded, and as standing on the record in the same position as the other defendants.—*Sifton v. McCabe*, 394.

Notice of action.] In giving notice of action to a magistrate, the notice must declare the place of residence of the attorney. The subscription of the attorney, therefore, at the bottom of the notice in this form: "A. B., attorney of the said C. D. Simcoe, Talbot District," was held insufficient.—*Bates v. Walsh*, 498.

Award of Venire.] An irregularity in the award of venire upon the record, is amendable by the court.—*Whitelaw v. Davidson*, 534.

Rule Mich. Term, 4 Geo. IV. Affixing notice of trial in deputy clerk of Crown's office.] A copy of a notice of trial can only be affixed in the office of the deputy clerk of the crown in the District in which the action is brought—when, therefore a testatum writ only had been issued into the district where the notice had been put up, the notice of trial held to be irregular.—*Chase v. Gilmour*, 604.

Attorney.] An attorney may sue process by another attorney, but may sign the usual notices endorsed on the process in his own name.—*Cameron v. Wheeler*, 355.

Judgment as in case of a non-suit.] Rule for judgment as in case of a nonsuit discharged without costs, the plaintiff having been led by the defendant to rely upon him for the procurement of some evidence in the cause, and for which the defendant subsequently and after the record had been entered, determined not to send.—*Doe Rees v. Dick*, 621.

Judgment as in case of a non-suit. Payment of the costs of the day and

of the application, conditions precedent. Rule of peremptory undertaking, by whom to be taken out and when.] Payment of the cost of the day, and of the costs of the applications for judgment as in case of a nonsuit, may be made a consideration precedent to the plaintiff's being allowed to discharge the rule for judgment, and to carry down the cause for trial at the next assizes. If no costs of the day have been incurred, that portion of the rule may be considered as surplusage; the rule need not be amended. The rule containing the peremptory undertaking of the plaintiff to go to trial, may be taken out by the defendant after term, though moved for by the plaintiff in term. This rule may also be taken out after the time therein limited for the plaintiffs taking the cause down to trial.—*Ross q. t. v. Meyers*, 622.

Interpleader act. Making up the issue. Order of Court thereupon.] When no time has been limited by an interpleader order for the plaintiff to make up the issue between the parties, the court will order the issue to be made up by the claimants on or before a certain day, or on default thereof to be barred from prosecuting the claim.—*Shields v. Davis*, 628.

Setting aside writ of fi. fa. sued out by assignee of judgment in the name of the assignor.] A. obtains judgment against B. on his bond, and after this assigns the judgment to C. for valuable consideration; C. issues a writ against B.'s lands in the name of A.; B. applies to set the writ aside; the court discharged the application.—*Commercial Bank v. Boulton*, 627.

Insolvent debtor. Discharge.]—A prisoner in execution for debt

cannot, by signing his effects in trust for such creditors as choose to come in and on receiving a dividend give him an absolute discharge, make himself an insolvent debtor within the terms of the stat. 10 & 11 Vic., ch. 15.—*Gillespie et al. v. Nickerson*, 628.

PROCESS.

Copy of process. Irregularity.] The omission of the letter L. S., or of any mark to denote a seal in the copy of a writ, is not an irregularity.—*Cameron v. Wheeler*, 355.

PROMISSORY NOTE.

Indorsee vs. maker of. Plea of payment or satisfaction by maker. De injuria.] In an action by the endorsee against the maker of a note, a plea of satisfaction by the maker to the payee after the note became due, is well traversed by the replication of *de injuria*.—*Robinson, C. J., dissentiente.*—*Muttlebury v. Hornby*, 61.

Replication of de injuria.]—To an action by the endorsee against the maker of a promissory note payable to bearer, the defendant pleaded payment or satisfaction to the payee before the note became due, and that it was transferred to the plaintiff after such payment, without any consideration from the plaintiff to the endorser, and that the plaintiff held the same without giving consideration therefor. Replication, *de injuria*. Demurrer. *Held, per Cur.*, replication of *de injuria* good. *Robinson, C. J., dissentiente.*—*Brooke v. McCausland*, 105.

Plea.] A plea, that the defendant endorsed the note without consideration from the maker or the plaintiff, is bad.—*Bank of B. N. A. v. Sherwood*, 213.

Pleading. Inconsistent pleas.

Verification.] A plea, stating that defendant paid the note on the 31st December, 1848, before it became due, when by the declaration it appeared that the note fell due in January, 1848, is bad for inconsistency on general demurrer. *Semble, also*; that such a plea, not denying in precise terms the non-payment as alleged, should conclude with a verification. *Bown v. Hawke*, 275.

Want of consideration.] A plea, "that the promissory note was made by the defendant to the plaintiff as a gratuity, and that he, the defendant, never had or received any consideration therefor," is good.—*Poulton v. Dolmage*, 277.

Note payable to bearer, and endorsed. Endorser liable.] A. makes a note payable to B. or bearer, and delivers it to B. B. endorses it. C., the holder, sues B. on his endorsement. *Held, per Cur.*, that upon such endorsement an action would well lie against B.—*Booth v. Barclay*, 215.

What put in issue by the plea of did not endorse in manner, &c. An endorsement of a note when overdue, no excuse for presentment to maker. Nonsuit of plaintiff upon insufficient grounds must be set aside, though declaration bad.] A., the endorsee of a note, sued B., the endorser, and alleged in his declaration that after the note became due, to wit, &c. B. endorsed to A. There was no averment of presentment to the maker, or of notice of non-payment. B. alleged that he did not endorse the note in manner and form as the plaintiff alleged. *Held, per Cur.*, that under this plea, the fact of endorsement (and not the time) was all that was put in issue. *Held, also*, that the

note being endorsed to the plaintiff when overdue, was no excuse for non-presentment to the maker, and that therefore the declaration was bad in not shewing a sufficient cause of action. *Held, also*, that though the declaration was substantially defective, yet, as the plaintiff had been non-suited upon the insufficient ground of not proving the time, as well as the fact of endorsement, the nonsuit must be set aside. The court, however, in such a case, may grant a new trial without costs, and then allow the plaintiff to amend.—*Davis v. Dunn & Parker*, 327.

Special pleas.] Indorsee against maker upon an overdue note. Pleas—setting out the special circumstances under which the note was originally given, and denying thereupon the right of the payees to negotiate the note. *Held, per Cur.*, pleas no defence as to a certain portion of the note, but a good defence as to the balance.—*Rennie v. Jarvis*, 329.

Endorser's liability to holder, under a subsequent promise to pay, where due notice of non-payment, though put in issue, cannot be proved.] Upon the issues of non-presentment and non-payment, the holder of a note will be entitled to recover against the endorser by proving his subsequent express or implied promise to pay, even though the promise be made after the action brought, and after issue joined.—*McCuniffe v. Allen et al.* 377.

Failure of consideration.]—*Quere* as to the defence upon a note being good, where it does not go to an entire failure of consideration in the note.—*Thompson v. Farr*, 387.

Pleading. Initials.] In declaring upon a promissory note

the name of the payee was set forth as John S. Shaver. *Held, per Cur.*, upon demurrer, for not setting forth at full length the second Christian name, declaration good.

The court, in Mich. Term, 1849, in two cases, adhered to the decision they came to as laid down in this case.—*Dougall v. Reafisch*, 391.

Pleading.] The plaintiff sued the defendant as maker of a note payable to themselves. The defendant pleaded that he made the note for the accommodation of the plaintiffs, and that there was never any value or consideration given to him for it. The plaintiffs replied that there was a good consideration for the making of the note, to wit, to the amount thereof, and concluded to the contrary, without noticing the averment in the plea, that the note was an accommodation note; and for this cause the defendant demurred specially. *Held, per Cur.*, replication bad.—*Brown et al. v. Wheeler*, 393.

The statute 5 Will. IV., ch. 1, does not apply to parties signing notes as joint makers.

The plaintiff proceeding upon a note against several defendants as joint contractors, chargeable on the same contract, and in the same capacity, must prove a case against all of them.

The promise to pay by one of several joint and several makers of a note will take the case out of the Statute of Limitations.—*Sifton v. McMabe*, 394.

Parol agreement altering the terms of a note.] The maker of a note, absolute in its terms to pay the whole amount at maturity, will not be allowed to set up the defence of an alleged parol agreement on the part of the holder to

renew the note upon being paid half the amount.—*Hayes v. Davis*, 396.

Pleadings. Averment of joint and several liability, under 3 Vic., ch. 8.] The defendants were sued as maker and endorser of a note under the statute 3 Vic., ch. 8. The declaration, after setting out the note and endorsement, stated the defendants' liability thus, "whereby the defendants became liable," &c. *Held, per Cur.*, on special demurrer, declaration bad, in not alleging, according to the form, a joint and several liability.—*Nordheimer et al. v. O'Reilly et al.* 413.

Note made payable "to the order of the plaintiff." *Endorsement by plaintiff.]* A note, payable to a person or his order, or to the order of a person, means the same thing, and may be sued upon stating it either way.

Where a note is drawn payable "to the order of the plaintiff," it need not be endorsed by the plaintiff to himself to give it the effect of a note payable to the plaintiff.—*Myers v. Wilkins*, 421.

Variance. Note payable to maker's order.] Held per Cur., that the following note, "Four months after date, I promise to pay to my own order, at the office of the Commercial Bank here, 231. 16s. 2d., value received," and endorsed by the maker, could not be declared upon as a note payable "to the plaintiff or bearer."

Semble, that a note in this form, when endorsed by the maker, becomes a note payable generally to bearer, but not to any particular person.—*Burns & Dugan v. Harper*, 509.

The effect of a prior endorser of a note being made executor by the holder.] A. makes a note pay-

able to B. or order. B. endorses to C., who endorses to D. D., the holder, dies, leaving B. one of his executors. The executors of D. sue C. *Held, per Cur.*, that D., having made B. his executor, B. was discharged from the debt, and that there was no remedy against the subsequent endorser. *Semble*, that though, under the authority of *Bishop v. Hayward*, 4 T. R. 470, where a plaintiff suing in his own name, is liable over to the defendant, by reason of a prior endorsement, he cannot recover, yet if he sues with others, not in his own name, but as an executor, he may.—*Jenkins v. Mackenzie*, 544.

QUO WARRANTO.

Applied for by a party for an office, who shewed he could not write.] The court refused an information in the nature of a quo warranto, with a view to place a party in the office of a township clerk, who, in making his application shewed that he could not write.—*The Queen v. Ryan*, 296.

RATE COLLECTOR.

Not paying over moneys ineligible to any township office.] Under sec. 18 of the statute 1 Vic., ch. 21, a collector of rates, who has not paid over the amount collected by him and settled his accounts with the treasurer on or before the third Monday in December of the year for which he has been serving, is ineligible to any township office.—*The Queen v. Ryan*, 296.

SHERIFF.

Action against.] To an action against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.* the bare fact, that the plaintiff, after such return, sued out a *ca. sa.*, will be no defence, unless it be

further averred in the plea, that the plaintiff accepted the return of *nulla bona*, with a knowledge at the time that it was false.—*Bays v. Ruttan, Sheriff*, 263.

A plea by the sheriff to an action for a false return to a writ of *fi. fa.*, set out in the declaration, that there was not a writ of *fi. fa.* against A. B.'s goods duly sued out and duly returned, is bad.

A plea by the defendant that he did not seize any of the plaintiff's "goods," without adding "or chattels," is good on special demurrer.

The sheriff, sued by the execution creditor for a false return, cannot plead to the merits of the original action.—*Grantham v. Jarvis*, 511.

How far bound by his return.]

As a general rule, the sheriff is bound by his return to a writ of *fi. fa.*, but not in all cases; he would not be bound by it, for instance, where a verdict has passed against him on such return, and shewn it incorrect.—*Houlditch v. Corbett*, 549.

Sheriff's liability for not returning a writ of fi. fa. till ruled to do so.] The court will not fix a sheriff with the debt merely because he has not returned a writ of *fi. fa.* until after he has been ruled to do so. The plaintiff in execution will be left to his remedy by action against the sheriff.

Quere, Can a judge in chambers pass judgment upon a sheriff for contempt under our statute 7 Vic., ch. 33, after the object of the statute has been attained, viz., the return of the *fi. fa.*?—*Queen v. Jarvis*, 558.

Attachment. When sheriff can take bail under. Sheriff sued for escape of party arrested on attachment. Declaration. Pleas.] To an action of escape against the

sheriff, a plea that the prisoner escaped without the knowledge of the sheriff to places unknown to sheriff, and voluntarily and without knowledge of sheriff returned into the custody of the sheriff, is insufficient; the plea ought to aver that the sheriff did not know where the prisoner was during any period of his absence.

Semble, That if an attachment for contempt in not paying monies is to be regarded as *mesne process*, it should be averred in the declaration for an escape that the sheriff had not the party in court to answer the exigency of the writ. The averment merely that on the return day of the writ the sheriff allowed the party to go at large, will not do.

And if the attachment is to be regarded as an execution. *Semble*, it then requires something in the nature of a judgment to support it. The merely averring that the plaintiff sued out an attachment for contempt, without stating what the contempt consisted in, or by what authority it had been determined the party was guilty of contempt, is insufficient; a good legal foundation for the attachment must be shewn on the record.

Semble, That before the return of a writ of attachment for contempt, the sheriff cannot properly take bail for the appearance of a party without the order of a judge, but that after the return, if the party is in upon attachment merely to compel the payment of money, the sheriff, as of course, may take bail to the limits.—*Iane v. Kingsmill*, 579.

Ca. sa. When entitled to poundage.] Where the sheriff has the party in custody on a *ca. sa.* *Held, per Cur.*, that he has so far made the money (the body being

satisfaction) as to give him his claim to poundage under our rule Hilary term, 10 Vic.

No action lies by the sheriff against the plaintiff's attorney to claim poundage upon an execution which the attorney has placed in his hands to be executed.—Corbett, Sheriff, v. McKenzie, 605.

SHIP REGISTRY ACT.

8 Vic. ch. 5. *Necessity of reciting the certificate of registry of ownership in a mortgage.*] Under our Provincial Ship Registry Act, 8 Vic., ch. 5, secs. 13, 23, 24, the certificate of registry of ownership of a vessel is required to be recited in a transfer by way of mortgage or security, (with a power of sale in case of default,) as well as upon an absolute and immediate sale; and where this is omitted, the mortgage will be wholly void.—Watkins & Muchelstone, v. Corbett, Sheriff, 587.

Sufficiency of recital of certificate of registry in a transfer of a vessel by way of mortgage.]—*Held, per Cur.*, That the following recital of a certificate of registry of ownership of a vessel, contained in an indenture of sale of such vessel—the schooner “James Coleman of Dundas, and duly registered according to the statute in such case made and provided, and the certificate of ownership of which is granted to the said William Colcleugh, whereby it is certified that the said vessel was registered at the Custom House in the Port of Hamilton, the 8th day of April, 1847, and is of the burthen of 232⁷/₁₀, and which said certificate is under the hand of John Davidson, the collector of and for the said port of Hamilton, as reference to the said certificate will fully appear”—was not a sufficient compliance with our Pro-

vincial Ship Registry Act, 8 Vic., ch. 5, secs. 2, 7, 13, and that therefore the indenture of sale was void.

The recital was held insufficient in giving the tonnage alone of the vessel, which could not be said, within the terms of the 13th section of the act, to be such a description of the vessel as to shew the identity of the vessel transferred, with that described in the certificate of registry.—*Sherwood & Jones v. Coleman*, 614.

SLANDER.

Inducement of prefatory matter and colloquium when necessary to support innuendoes.] *Held, per Cur.*, in an action of slander, where the declaration contained three counts.

The 1st charging that defendant intended to cause it to be believed that the plaintiff had been guilty of sodomy, in a discourse which the defendant then had of and concerning the plaintiff, spoke the words following, “I saw Peter (meaning the plaintiff) with the heifer,” (meaning that he, the defendant, saw plaintiff commit the crime of sodomy with the heifer:)

The 2nd count charging, that the defendant, intending as aforesaid, in a certain other discourse, which he then had of and concerning the plaintiff, spoke the following words, “I (meaning the defendant) saw Peter (meaning the plaintiff) with the heifer (meaning the defendant's heifer) just at the crossway”—(meaning that the defendant saw the plaintiff then commit the crime of sodomy with the defendant's heifer:)

The 3rd count charging, that the defendant further contriving as aforesaid in a certain other discourse which the defendant then had of and concerning the plaintiff, spoke, &c., the words following, “I (meaning defendant) have

seen Peter Johnson (meaning the plaintiff) with my heifer"—(meaning the defendant's heifer:) "Peter Johnson (meaning the plaintiff) is the man that did it, and I (the defendant) can swear within a foot to the ground where he (meaning the plaintiff) stood at the time" (meaning the ground on which the plaintiff stood when he committed the crime aforesaid :

That the declaration was bad in arrest of judgment, on the ground that the words "charged" in the various counts did not of themselves import what was charged as their meaning, and that there was no sufficient inducement or statement of prefatory matter to which the innuendoes in the declaration could refer.—Robinson, C. J. dissentiente.—Johnson v. Hedge, 337.

Effect of the plea of "not guilty" in.] The plea of "not guilty" in an action of slander, operates as it did before the new rules, not merely in denial of speaking the words but of speaking them maliciously in order to defame.

All the circumstances, therefore, immediately preceding and attending the speaking of the words, may be given in evidence by the defendant under such plea.—Keegan v. Robson, 375.

STATUTES, CONSTRUCTION OF.

In dealing with awards made under the Provincial Acts, 9 Vic., ch. 37, sec. 24, and 10 & 11 Vic., ch. 24, sec. 3, the court will be governed by the ordinary rules of law as applicable to awards made between party and party.

Under the two acts above mentioned, a submission by the Governor in Council to arbitration, is a submission in effect by the Commissioners of Public Works.—

Com. of Public Works v. Daly, 33.

18 Eliz., ch. 5—*Compromise of qui tam actions.*—Bleeker v. Meyers, 134.

4 & 5 Vic. ch. 26, sec. 20 & 28—*Pleading justification.*—Madden v. Forley, 210.

4 & 5 Vic., ch. 7; 7 Vic., ch. 43—*Aliens and naturalization.*—Doe Chandler v. Tessier, 216.

51 Geo. III., ch. 9, sec. 2—*Damages on protested Bills.*—Nichols v. Raynes, 273.

8 Vic., ch. 13, secs. 20, 23 & 50—*Recognizance, District Court Practice.*—Cochrane v. Eyre, 289.

1 Vic., ch. 21, sec. 18—*Collectors of taxes.*—The Queen v. Ryan, 296.

32 Henry VIII., ch. 9—*Conveyance.*—Doe Simpson v. Molloy, 302.

2 Wm. IV., ch. 5—*Absconding Debtors Act.*—Thompson v. Farr, 387.

5 Wm. IV., ch. 1—*Promissory Notes.*—Sifton v. McCabe, 394.

4 Wm. IV., ch. 1, sec. 17,—*Dower.*—German v. Grooms, 414.

8 Vic., ch. 13, sec. 5—*Jurisdiction District Court.*—Bell v. Jarvis, 423.

7 Wm. IV., ch. 36—*Bank B. N. A.*—Bank B. N. A. v. Brown, 490.

8 Vic., ch. 10, sec. 2—*Lord's Day.*—Lai v. Stall, 506.

4 Wm. IV., ch. 1—*Construction of Will. Antecedent to.*—Doe Ford v. Bell, 527.

6 Wm. IV., ch. 18—*Wellington Mutual Ins. Co.*—Hobson v. W.M. I. Co., 536.

7 Vic. ch. 33—*Sheriff.*—Regina v. Jarvis, 558.

10 & 11 Vic., ch. 48—*Billiards. Town of London.*—Church qui tam v. Richards, 562.

11 Vic., ch. 14—*Toronto Gas Co.*—Gas Co. v. Russell, 567.

8 Vic., ch. 5—*Ship Registry Act.*—Watkins v. Corbett, 587.

8 Vic., ch. 36, sec. 2—*Testatum Act.*—Chase v. Gilmour, 604.

8 Vic., ch. 5, secs. 2, 7, 13—*Ship Registry Act.*—Sherwood v. Coleman, 614.

STATUTE LABOUR.

Where to be performed.] A party to save himself from fine, must perform when called upon, his statute labour within the division of the township in which he resides.—Gates v. Devenish, 261.

SUNDAY.

Sales on Sunday.] Under the 2nd clause of the 8 Vic., ch. 10, all sales of real and personal property made on a Sunday are void.

Semble, that mortgages would not be void.—Lai v. Stall, 506.

TITLE.

Interest of tenant at sufferance. *Release.*] A. received possession of land from B. A. died in 1846, and before his death A. and B. had been in occupation of the land for more than 20 years. A. died without issue and intestate, leaving his wife upon the land. C. his eldest brother and heir-at-law, claimed title and brought ejectment against A.'s wife. A.'s wife defended the suit, relying on a quit claim deed from B., who, upon giving up possession to A., had exchanged lands, and never having given A. his deed, as was alleged, now conveyed to his wife. But, *Held per Cur.*, that A.'s wife upon the death of her husband, being merely a tenant at sufferance, and having no interest upon which a simple release could operate, the release conveyed nothing, and the plaintiff was entitled to recover.—Doe Connor v. Connor, 299.

The validity of a purchaser's title under an ex-sheriff's deed, made after the writ against lands had expired, and after he had gone out of office.

What act of the sheriff, after a writ against lands has been put into his hands, can be said to be an inception of execution.] *Held, per Cur.*, (Draper, J., dissentiente), that the facts mentioned in the statement of this case (and which are too long to repeat in the digest) constituted such an inception of the execution against lands by the sheriff, during the currency of the writ, and while he was in office, that a deed, made under such execution, by the same sheriff, after the writ was current, and after he had gone out of office, passed the legal estate to the purchaser. *Held, also*, (Draper, J. dissentiente) that the conduct of the execution debtor (mentioned therein) shewed an acquiescence on his part in the ex-sheriff's right to proceed with the sale of lands, as he did, under the writ. Doe Tiffany v. Miller, 426.

TRESPASS.

Pleadings. Declaration—trespass for an assault on plaintiff's son. Plea—justification under the Provincial Criminal Act 4 & 5 Vic., ch. 26, secs. 20 & 28. Demurrer. What averments necessary to bring a justification within the provisions of this act.—Madden v. Farley, 210.

To an action of trespass for breaking and entering plaintiff's house, the defendant pleaded, that the plaintiff was violently assaulting his (the plaintiff's) wife and child, and that he entered, &c., as he lawfully might do, to prevent the plaintiff committing the said breach of the peace. *Held per Cur.*, plea bad in substance.—Rockwell v. Murray, 412.

USES AND TRUSTS.

As to the distinction between a "trust" and an "use."—Gamble et al. v. Rees, 397.

VARIANCE.

Variance between deed pleaded and produced.] Where the defendant set up a deed as made between A. B. of the one part, and the Bank of British North America of the other, and when produced at the trial it turned out to be a deed made between A. B. and Mr. Thomas Paton, who was afterwards stated in the body of the instrument to be the inspector of the bank; *Held, per cur.*, that the variance was fatal, and could not be amended.—*Bank B. N. A. v. Sherwood*, 552.

Promissory note.] *Held, per cur.*, that the following note: "Four months after date, I promise to pay to my own order, at the office of the Commercial Bank here £23 16s. 2d., value received," and endorsed by the maker, could not be declared upon as a note payable "to the plaintiffs or bearer."

Semble, that a note in this form, when endorsed by the maker, becomes a note payable generally to bearer, but not to any particular person:—*Burns & Duggan v. Harper*, 509.

VENIRE.

An irregularity in the award of venire upon the record is amendable by the court. *Whitelaw v. Davidson*, 534.

WILL.

Cancellation of a will. What makes such an act complete. Its effect when the draft of a new will is found with it unexecuted. The position of an heir when finding such papers. Has he in any way, in the absence of fraud, to account for the cancellation of the old will?

Where A. meaning to make a new will, and having the draft with him for that purpose, has

cancelled the first will, not by making obliterations and alterations in the body of it, but destroying the execution, as by tearing off his name an seal, and then dies suddenly before he has executed the other will—*Held, per Cur.*, That A. under such circumstances dies intestate.

Held, also, That the heir at law, finding such old will cancelled, and the draft with it, is not called upon in the absence of any imputation of fraud, to account for the cancellation of the old will.

Quære, When the name and seal of a testator clearly appear to have been struck out of a will, should the *animus cancellandi* be still left as a question of fact for the jury.—*Doe Crooks v. Cummings*, 305.

Will, construction of.] *Held per Cur.*, Under the following will, (the testator dying before the Statute 4 Wm. IV., ch. 1, came into force,) "And touching my worldly estate, I give and dispose of the same," &c., then follow various devises to several children, of specified lots of land; then the will goes on "All other property of which I shall die possessed and not herein mentioned, I wish to be equally divided between the five children before named." The testator then added "To the Honorable John Kirby of Kingston, I give and bequeath Lot No. 9 in the 7th Concession of the Township of Nelson and County of Halton, and I appoint the said Kirby one of my executors." That John Kirby took only an estate for life in No. 9, and that the reversionary interest in the said lot passed to the residuary devisees, the testator's five children, and not to the heir at law.—*Doe Ford v. Bell*, 527.

